S. Hrg. 100-887

ADMINISTRATIVE LAW JUDGE CORPS ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON
COURTS AND ADMINISTRATIVE PRACTICE

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDREDTH CONGRESS

FIRST SESSION

ON

S. 950

A BILL TO ESTABLISH A SPECIALIZED CORPS OF JUDGES NECESSARY FOR CERTAIN FEDERAL PROCEEDINGS REQUIRED TO BE CONDUCTED, AND FOR OTHER PURPOSES

JULY 21, 1987

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ADMINISTRATIVE LAW JUDGE CORPS ACT

TUESDAY, JULY 21, 1987

U.S. Senate,
Subcommittee on Courts and Administrative Practice,
Committee on the Judiciary,
Washington, DC.

The subcommittee met, pursuant to notice, at 8 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Howell Heflin (chairman of the subcommittee) presiding.

Also present: Senators Thurmond, Grassley, and DeConcini.

OPENING STATEMENT OF HON. HOWELL HEFLIN, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator **Heflin**. The Subcommittee on Courts and Administrative Practice of the Committee on the Judiciary's hearing on S. 950, an independent corps for administrative law judges, will now convene.

I have an opening statement, but will submit it for the record due to the fact that we are meeting at this early hour and that we have time problems—and I appreciate the witnesses and everybody being here at this time. We have the Iran-Contra hearings coming on and I am required to be other places at times of the day when we normally have hearings, so I appreciate everyone accommodating my schedule.

Rather than make my opening statement, I will just submit it as a part of the record. We have had in several other Congresses hearings on this, but to have the record complete, I will enter my statement without reading it.

[The prepared statement of Senator Heflin and a copy of S. 950 follow:]

Prepared Statement of Senator Howell Heflin

I want to thank each of you for accommodating my schedule this morning. I will ask that each of you summarize your statements in about 5 minutes. Your complete statements will be made a part of the hearing record. I have to be at the Iran-Contra hearings at 9 a.m. and want to hear from as many of you as possible. I have introduced legislation to establish an independent corps of administrative law judges in the past two Congresses—S. 1275 in the 98th Congress and S. 673 in the 99th Congress. This Congress I am pleased to be joined by 13 of my colleagues in cosponsoring this legislation.

The concept of an Administrative Law Judge Corps is designed to ensure the independence and integrity of our Federal administrative system. This bill would create such a corps—a corps which would be independent of the agencies they now serve.

Testimony received here today and in the previous three hearings on this subject should show that such an independent corps has the potential to save millions of dollars, be a more efficient use of personnel, and provide the fundamental fairness guaranteed by the American system of jurisprudence.

With well over 1,000 administrative law judges now hearing in excess of 250,000 cases per year, and in an era of eroding public faith in fair and equitable treatment by the Government, the time for structural reform has arrived. Perhaps the most important aspect of this bill is to establish irrefutably not only a public perception of fundamental fairness, but in fact, the maxim that all judicial officers be free from any association of personal obligation to any party.

In the several States which have adopted the independent corps concept, each State has experienced improved public perception of administrative law judges as members of a truly independent adjudicative body. These States have also experienced substantial cost savings and increased efficiency in operation—all worthwhile and necessary goals.

Based on the experience of the States, perhaps it is now time for the Federal Government to benefit from the laboratory of State experience and adopt the best of these improvements.

I look forward to the testimony we are about to hear this morning and hope we can do so as expeditiously as possible.

100TH CONGRESS
1ST SESSION

S. 950

To establish a specialized corps of judges necessary for certain Federal proceedings required to be conducted, and for other purposes.

IN THE SENATE OF THE UNITED STATES

APRIL 8 (legislative day, MARCH 30), 1987

Mr. HEFLIN (for himself, Mr. SPECTER, Mr. SHELBY, Mr. DURENBERGER, Mr. HEINZ, Mr. SARBANES, Mr. SASSER, Mr. GORE, and Mr. SANFORD) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

A BILL

To establish a specialized corps of judges necessary for certain Federal proceedings required to be conducted, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Administrative Law Judge Corps Act".

ESTABLISHMENT OF ADMINISTRATIVE LAW JUDGE CORPS

SEC. 2. (a) Chapter 5 of title 5, United States Code, is amended by adding at the end thereof a new subchapter IV to read as follows:

"SUBCHAPTER IV—ADMINISTRATIVE LAW JUDGE CORPS

"§ 581. Definitions

"For the purposes of this subchapter—

"(1) 'agency' means an authority referred to in section 551(1) of this title;

"(2) 'Corps' means the Administrative Law Judge Corps of the United States established under section 582 of this title;

"(3) 'administrative law judge' means an administrative law judge appointed under section 3105 of this title on or before the effective date of the Administrative Law Judge Corps Act or under section 587 of this title after such effective date;

"(4) 'chief judge' means the chief administrative law judge appointed and serving under section 583 of this title;

"(5) 'Council' means the Council of the Administrative Law Judge Corps established under section 585 of this title;

"(6) 'Nomination Commission' means the Judicial Nomination Commission for the Administrative Law Judge Corps established under section 586 of this title;

"(7) 'Board', unless otherwise indicated, means the Complaints Resolution Board established under section 589 of this title; and

"(8) 'division chief judge' means the chief administrative law judge of a division appointed and serving under section 584 of this title.

"§ 582. Establishment; membership

"(a) There is established an Administrative Law Judge Corps consisting of all administrative law judges, in accordance with the provisions of subsection (b). Such Corps shall be located in Washington, D.C.

"(b) An administrative law judge serving as such on the date of the commencement of the operation of the Corps shall be transferred to the Corps as of that date. An administrative law judge who is appointed on or after the date of the commencement of the operation of the Corps shall be a member of the Corps as of the date of such appointment.

"§ 583. Chief administrative law judge

"(a) The chief administrative law judge shall be the chief administrative officer of the Corps and shall be the presiding judge of the Corps. The chief judge shall be nominated as prescribed in section 586 of this title and shall be appointed by the President, by and with the advice and consent of the Senate. The chief judge must be an administrative law judge who has served as an administrative law judge for at least five years preceding the date of appointment as chief judge. The chief judge shall serve for a term of five years or until a successor is appointed and qualifies to serve, whichever is earlier. A chief judge may be reappointed upon the expiration of his term, by and with the advice and consent of the Senate, if nominated for reappointment in accordance with section 586 of this title.

"(b)(1) If the office of chief judge is vacant, the division chief judge who is senior in length of service as a member of the Council shall serve as acting chief judge until such vacancy is filled.

"(2) If two or more division chief judges have the same length of service as members of the Council, the division chief judge who is senior in length of service as an administrative law judge shall serve as such acting chief judge.

"(c) The chief judge shall, within ninety days after the end of each fiscal year, make a written report to the President and the Congress concerning the business of the Corps during the preceding fiscal year. The report shall include information and recommendations of the Council concerning the future personnel requirements of the Corps. If the Council recommends the appointment of an administrative law judge to add a new position to the Corps, or to fill a vacancy caused by retirement, resignation, removal or death of such judge, the chief judge shall submit information substantiating the need for such appointment.

"(d) After serving as chief judge, such individual may continue to serve as an administrative law judge unless such individual has been removed from office in accordance with section 589 of this title.

"§ 584. Divisions of the Corps; division chief judges

"(a) The Corps shall have not more than ten and not less than four divisions. Each judge of the Corps shall be assigned to a division. The assignment of a judge who was an administrative law judge on the date of commencement of the operation of the Corps shall be made after consideration of the areas of specialization in which the judge has served. Each division shall be headed by a division chief judge who shall exercise administrative supervision over such division.

"(b) Except as provided in subsection (a), and after the initial appointment of a division chief judge as provided in subsection (c), and the establishment of each division pursuant to this subsection, the number of divisions and the jurisdiction of each division shall be determined by the Council. Until changed by the Council, the divisions of the Corps shall be as follows:

"(1) Division of Communications, Public Utility, and Transportation Regulation.

"(2) Division of Safety and Environmental Regulation.

"(3) Division of Labor.

"(4) Division of Labor Relations.

"(5) Division of Health and Benefits Programs.

"(6) Division of Securities, Commodities, and Trade Regulation.

"(7) Division of General Programs and Grants.

"(c)(1) Each division chief judge shall be nominated as prescribed in section 586 of this title. The first division chief judge of each division set forth in subsection (b) shall be appointed by the President, by and with the advice and consent of the Senate. After such initial appointments, each division chief judge shall be appointed by the chief judge, with the approval of the Council.

"(2) To be eligible for nomination and appointment as a division chief judge, an individual must have served as an administrative law judge for at least five years and should possess experience and expertise in the specialty of the division to which such person is an appointee.

"(3)(A) Division chief judges shall be appointed for five-year terms except that of those division chief judges first appointed, the President shall designate two such individuals to be appointed for five-year terms, three for four-year terms, and two for three-year terms.

"(B) If the number of divisions provided for under this subsection is increased, the initial appointment of a division chief judge to a new division shall be made for a term of no more than five years, such that the terms of no more than four of such division chief judges expire in any one year.

"(4) Any division chief judge appointed to fill an unexpired term shall be appointed only for the remainder of such predecessor's term, but may be reappointed as provided in paragraph (5).

"(5) Any division chief judge may be reappointed upon the expiration of his term if nominated for such appointment pursuant to section 586 of this title.

"(6) Any judge, after serving as division chief judge may continue to serve as an administrative law judge unless such individual has been removed from office in accordance with section 589 of this title.

"§ 585. Council of the Corps

"(a) The policymaking body of the Corps shall be the Council of the Corps. The chief judge and the division chief judges shall constitute the Council. The chief judge shall preside over the Council. If the chief judge is unable to be present at a meeting of the Council, the division chief judge who is senior in length of service as a member of such Council shall preside.

"(b) One half of all of the members of the Council shall constitute a quorum for the purpose of transacting business. The affirmative vote by a majority of all the members of the Council shall be required to approve a matter on behalf of the Council. Each member of the Council shall have one vote.

"(c) Meetings of the Council shall be held at least once a month at the call of the chief judge or by the call of one-third of the members of the Council.

"(d) The Council is authorized—

"(1) to assign judges to divisions and transfer or reassign judges from one division to another, subject to the provisions of section 587 of this title;

"(2) to create or reconstitute divisions of the Corps or abolish any such division effective at the expiration of the term of the division chief judge for such division;

"(3) to appoint persons as administrative law judges and members of the Corps under section 587 of this title;

"(4) to file charges seeking adverse action against an administrative law judge under section 589 of this title;

"(5) subject to the provisions of subsection (e), to prescribe, after providing an opportunity for notice and comment, the rules of practice and procedure for the conduct of proceedings before the Corps, except that, with respect to a category of proceedings adjudicated by an agency before the effective date of the Administrative Law Judge Corps Act, the Council may not amend or revise the rules of practice and procedure prescribed by that agency during the two years following such effective date without the approval of that agency, and any amendments or revisions made to such rules shall not effect or be applied to any pending action;

"(6) to issue such rules and regulations as may be appropriate for the efficient conduct of the business of the Corps and the implementation of this subchapter, including the assignment of cases to administrative law judges;

"(7) subject to the civil service and classification laws and regulations, to select, appoint, employ, and fix the compensation of the employees (other than administrative law judges) that such Council deems necessary to carry out the functions, powers, and duties of the Corps and to prescribe the authority and duties of such employees;

"(8) to establish, abolish, alter, consolidate, and maintain such regional, district, and other field offices as are necessary to carry out the functions, powers, and duties of the Corps and to assign and reassign employees to such field offices;

"(9) to procure temporary and intermittent services under section 3109 of this title;

"(10) to enter into, to the extent or in such amounts as are authorized in appropriation Acts, without regard to section 3709 of the Revised Statutes of the United States (41 U.S.C. 5), contracts, leases, cooperative agreements, or other transactions that may be necessary to conduct the business of the Corps;

"(11) to delegate any of the chief judge's functions or powers with the consent of the chief judge, or whenever the office of such chief judge is vacant, to one or more division chief judges or to other officers or employees of the Corps, and to authorize the redelegation of any of those functions or powers;

"(12) to establish, after consulting with an agency, initial and continuing educational programs to assure that each administrative law judge assigned to hear cases of an agency has the necessary training in the specialized field of law of that agency;

"(13) to make suitable arrangements for continuing judicial education and training of other employees of the Corps, so that the level of expertise in the divisions of the Corps will be maintained and enhanced; and

"(14) to determine all other matters of general policy of the Corps.

"(e) The Council shall select an official seal for the Corps which shall be officially noticed.

"§ 586. Judicial Nomination Commission

"(a) There is established a Judicial Nomination Commission for the Administrative Law Judge Corps. The Nomination Commission shall consist of five members selected as provided in subsection (b). The Nomination Commission shall submit the names of qualified nominees for appointment to the position of chief judge and positions as division chief judges.

"(b) Each of the following persons shall appoint one member to the Nomination Commission within thirty days after the effective date of the Administrative Law Judge Corps Act:

"(1) The chief judge of the United States Court of Appeals for the District of Columbia Circuit.

"(2) The chief judge of the United States District Court for the District of Columbia.

"(3) The Chairman of the Administrative Conference of the United States.

"(4) The President of the American Bar Association.

"(5) The President of the National Bar Association, Incorporated.

"(c)(1) The persons first appointed pursuant to paragraphs (1) and (2) of subsection (b) shall each serve for a term of three years.

"(2) The person first appointed pursuant to paragraph (3) of subsection (b) shall serve for a term of two years.

"(3) The persons first appointed pursuant to paragraphs (4) and (5) of subsection (b) shall each serve for a term of one year.

"(d)(1) Subject to the provisions of this subsection, a vacancy on the Nomination Commission shall be filled in the same manner as the original appointment. An officer or employee of the United States may be a member of the Commission. The Commission shall select one of its members to be the Chairman.

"(2) Any member appointed to serve an unexpired term which has arisen by virtue of the death, disability, retirement, or resignation of a member shall be appointed only for such unexpired term, but shall be eligible for reappointment.

"(3) Each person appointed pursuant to this section after the initial appointments made in accordance with subsection (c) shall be appointed for a term of three years.

"(e)(1) For the initial appointment of the chief judge or, in the event of a subsequent vacancy in such position prior to the end of the term of such judge, the Nomination Commission, within ninety days after the effective date of the Administrative Law Judge Corps Act or sixty days after notification by the acting chief judge that a vacancy has occurred, as the case may be, shall submit to the President for appointment a list of the names of three persons qualified to fill the vacancy.

"(2) Not less than sixty days before the term of the chief judge expires, the Nomination Commission shall submit to the President for appointment a list of the names of three persons, one of whom may be the incumbent chief judge, who are qualified to be the chief judge.

"(3) For the initial appointment of the division chief judges, the Nomination Commission, within ninety days after the effective date of the Administrative Law Judge Corps Act, shall submit to the President for appointment a list of the names of three persons qualified to fill each such position.

"(4) If there is a vacancy in a position of division chief judge, the chief judge shall notify the Chairman of the Nomination Commission within ten days after such vacancy occurs. Within sixty days after such notice, the Nomination Commission shall submit to the chief judge for appointment a list of the names of three persons qualified to fill the vacancy.

"(5) The President, by and with the advice and consent of the Senate, or chief judge, as the case may be, shall appoint judges pursuant to this subsection from the lists provided by the Nomination Commission. The President, or the chief judge, as appropriate, may, however, reject any list provided for any position and request that such Commission submit another list for any such position.

"(f)(1) A member of the Nomination Commission who is an officer or employee of the United States shall not receive additional compensation for serving as a member of such Nomination Commission. Other members of the Commission shall receive compensation at the daily equivalent of the rate provided for employees in grade GS-18 of the General Schedule, established under section 5332 of this title, for each day, including traveltime, he or she is engaged in the actual performance of his or her duties as a member of the Commission. A member shall not be deemed an officer or employee of the United States solely by reason of his or her service as a member of the Nomination Commission.

"(2) All agencies of the United States shall provide to the Nomination Commission, to the extent allowed by law, the assistance and facilities that the Nomination Commission requests, including access to records and other information pertaining to prospective nominees, in order to enable the Nomination Commission to perform its functions. Records and information so furnished shall be treated as privileged and confidential by the Nomination Commission.

"(3) Funds appropriated to conduct the general operations of the Corps may be expended to defray the expenses of the Nomination Commission.

"§ 587. Appointment and transfer of administrative law judges

"(a) After the initial establishment of the Corps, the Council shall appoint new or additional judges as may be necessary for the efficient and expeditious conduct of the business of the Corps. Appointments shall be made from a register maintained by the Office of Personnel Management under subchapter I of chapter 33 of this title. Upon request by the chief judge, the Office of Personnel Management shall certify enough names from the top of such register to enable the Council to consider five names for each vacancy. Notwithstanding section 3318 of this title, a vacancy in the Corps may be filled from the highest five eligible individuals available for appointment on the certificate furnished by the Office of Personnel Management.

"(b) A judge of the Corps may not perform or be assigned to perform duties inconsistent with the duties and responsibilities of an administrative law judge.

"(c) A judge of the Corps on the date of commencement of the operation of the Corps may not thereafter be involuntarily reassigned to a new permanent duty station if such station is beyond commuting distance of the duty station which is the judge's permanent duty station on that date, unless the Council determines and submits a written explanation to the judge stating that such reassignment is required to meet substantial changes in workloads. A judge may be temporarily detailed, once in a twenty-four-month period, to a new duty station at any location, for a period of not more than one hundred and twenty days.

"§ 588. Jurisdiction

"(a) All types of cases, claims, actions and proceedings heretofore held before administrative law judges shall be referred to the Corps.

"(b) An administrative law judge who is a member of the Corps shall hear and render a decision upon—

"(1) every case of adjudication subject to the provisions of section 554 of this title;

"(2) every case in which hearings are required by law to be held in accordance with section 554 or section 556 of this title; and

"(3) every other case referred to the Corps by an agency or court in which a determination is to be made on the record after an opportunity for a hearing.

"(c) When a case under subsection (b) arises, it shall be referred to the Corps. Under regulations issued by the Council the case shall be assigned to an administrative law judge. Administrative law judges shall be assigned to cases within their division in rotation, so far as practicable.

"(d) Federal agencies and courts are hereby authorized to refer to the Corps any other case where a determination on the record after an opportunity for a hearing by a judge of the Corps is found by such court or agency to be desirable and appropriate.

"§ 589. Removal and discipline

"(a) Except as provided in subsection (b) of this section—

"(1) an administrative law judge may not be removed, suspended, reprimanded, or disciplined except for misconduct or neglect of duty, but may be removed for physical or mental disability; and

"(2) an action specified in paragraph (1) of this subsection may be taken against an administrative law judge only after the Council has filed a notice of adverse action against the administrative law judge with the Merit Systems Protection Board and the Board has determined, on the record after an opportunity for a hearing before the Board, that there is good cause to take such action.

"(b) Subsection (a) does not apply to—

"(1) the replacement or reassignment of a division chief judge as provided in section 585(d) of this title; and

"(2) an action initiated under section 1206 of this title.

"(c) Under regulations issued by the Council, a Complaints Resolution Board shall be established within the Corps to consider and to recommend appropriate action to be taken when a complaint is made concerning the official conduct of a judge. Such complaint may be made by any interested person, including parties, practitioners, the chief judge, and agencies.

"(d) The Board shall consist of two judges from each division of the Corps who shall be appointed by the Council. The chief judge and the division chief judges may not serve on such Board.

"(e) A complaint of misconduct by an administrative law judge must be made in writing. The complaint shall be filed with the chief judge, or it may be originated by the chief judge on his own motion. The chief judge shall refer the complaint to a panel consisting of three members of the Board selected by the Council, none of whom may be serving in the same division as the administrative law judge who is the subject of the complaint. The administrative law judge who is the subject of the complaint shall be given notice of the complaint and the composition of the panel. The administrative law judge may challenge peremptorily not more than two members of the panel. The Council shall replace a challenged member with another member of the Board who is eligible to serve on such panel.

"(f) The panel shall inquire into the complaint and shall render a report thereon to the Council. A copy of the report shall be provided concurrently to the administrative law judge who is the subject of the complaint. The report shall be advisory only.

"(g) The proceedings, deliberations, and reports of the Board and the contents of complaints under this section shall be treated as privileged and confidential. Documents considered by the Board and reports of the Board are exempt from disclosure or publication under section 552 of this title. Section 552b of this title does not apply to the Board.".

(b) The table of sections for chapter 5 of title 5, United States Code, is amended by adding at the end thereof the following:

"SUBCHAPTER IV—ADMINISTRATIVE LAW JUDGE CORPS

"Sec.
"581. Definitions.
"582. Establishment; membership.
"583. Chief administrative law judge.
"584. Divisions of the Corps; division chief judges.
"585. Council of the Corps.
"586. Judicial Nomination Commission.
"587. Appointment and transfer of administrative law judges.
"588. Jurisdiction.
"589. Removal and discipline.".

AGENCY REVIEW STUDY AND REPORT

Sec. 3. The chief administrative law judge of the Administrative Law Judge Corps of the United States shall make a study of the various types and levels of agency review to which decisions of administrative law judges are subject. A separate study shall be made for each division of the Corps. The studies shall include monitoring and evaluating data and shall be made in consultation with the division chief judges, the Chairman of the Administrative Conference of the United States, and the agencies that review the decisions of administrative law judges. Not later than two years after the effective date of this Act, the Council shall report to the President and the Congress on the findings and recommendations resulting from the studies. The report shall include recommendations, including recommendations for new legislation, for any reforms that may be appropriate to make review of administrative law judges' decisions more efficient and meaningful and to accord greater finality to such decisions.

TRANSITION AND SAVINGS PROVISIONS

Sec. 4. (a) There are transferred to the administrative law judges of the Administrative Law Judge Corps established by section 582 of title 5, United States Code (as added by section 2 of this Act), all functions performed on the day before the effective date of this Act by the administrative law judges appointed under section 3105 of such title before the effective date of this Act.

(b) With the consent of the agencies concerned, the Administrative Law Judge Corps of the United States may use the facilities and the services of officers, employees, and other personnel of agencies from which functions and duties are transferred to the Corps for so long as may be needed to facilitate the orderly transfer of those functions and duties under this Act.

(c) The personnel, assets, liabilities, contracts, property, records, and unexpended balances of appropriations, authorizations, allocations, and other funds employed, held, used, arising from, available or to be made available, in connection with the functions, offices, and agencies transferred by this Act, are, subject to section 1531 of title 31, United States Code, correspondingly transferred to the Corps for appropriate allocation.

(d) The transfer of personnel pursuant to subsection (b) of this section shall be without reduction in pay or classification for one year after such transfer.

(e) The Director of the Office of Management and Budget, at such time or times as the Director shall provide, may make such determinations as may be necessary with regard to the functions, offices, agencies, or portions thereof, transferred by this Act, and to make such additional incidental dispositions of personnel, assets, liabilities, grants, contracts, property, records, and unexpended balances of appropriations, authorizations, allocations, and other funds held, used, arising from, available to, or to be made available in connection with such functions, offices, agencies, or portions thereof, as may be necessary to carry out the provisions of this Act.

(f) All orders, determinations, rules, regulations, certificates, licenses, and privileges which have been issued, made, granted, or allowed to become effective in the exercise of any duties, powers, or functions which are transferred under this Act and are in effect at the time this Act becomes effective shall continue in effect according to their terms until modified, terminated, superseded, set aside, or repealed by the Administrative Law Judge Corps of the United States or a judge thereof in the exercise of authority vested in the Corps or its members by this Act, by a court of competent jurisdiction, or by operation of law.

(g) Except as provided in subsections (d)(5) and (e) of section 585 of title 5, United States Code, this Act shall not affect any proceeding before any department or agency or component thereof which is pending at the time this Act takes effect. Such a proceeding shall be continued before the Administrative Law Judge Corps of the United States or a judge thereof, or, to the extent the proceeding does not relate to functions so transferred, shall be continued before the agency in which it was pending on the effective date of this Act.

(h) No suit, action, or other proceeding commenced before the effective date of this Act shall abate by reason of the enactment of this Act.

AUTHORIZATION OF APPROPRIATIONS

SEC. 5. There are hereby authorized to be appropriated such sums as may be necessary to carry out the provisions of this Act and subchapter IV of title 5, United States Code (as added by section 2 of this Act).

TECHNICAL AND CONFORMING AMENDMENTS

SEC. 6. Title 5, United States Code, is amended as follows:

(1) Section 573(b) is amended by redesignating paragraphs (4), (5), and (6) as paragraphs (5), (6), and (7), respectively, and inserting a new paragraph (4) to read as follows:

"(4) the chief administrative law judge of the Administrative Law Judge Corps of the United States;".

(2) Section 3105 is amended to read as follows:

"§ 3105. Appointment of administrative law judges

"Administrative law judges shall be appointed by the Council of the Administrative Law Judge Corps pursuant to section 587 of this title.".

(3) Section 3344 and any references to such section are repealed.

(4) The table of sections for chapter 33 is amended by striking out the item relating to section 3344.

(5) The tables of contents of this title and of chapter 5 thereof each are amended by inserting after the item relating to section 559 the following:

(6)(A) Subchapter III of chapter 75 of title 5, United States Code, is repealed.

(B) The table of sections at the beginning of chapter 75 of title 5, United States Code, is amended—

(i) by striking out the items relating to subchapter III and section 7521;

(ii) by redesignating "Subchapter IV" and all references to such subchapter as "Subchapter III"; and

(iii) by redesignating "Subchapter V" and all references to such subchapter as "Subchapter IV".

(7) Section 5314 is amended by adding at the end thereof the following:

"Chief Administrative Law Judge of the Administrative Law Judge Corps".

(8) Section 5315 is amended by adding at the end thereof the following:

"Division Chief Judges of the Administrative Law Judge Corps".

(9) Section 5316 is amended by adding at the end thereof the following:

"Administrative Law Judges in the Administrative Law Judge Corps.".

(10)(A) Section 5372 is repealed.

(B) The table of sections at the beginning of chapter 53 of such title is amended by striking out the item relating to section 5372.

OPERATION OF THE CORPS

SEC. 7. Operation of the Corps shall commence on the date the first chief administrative law judge of the Corps takes office.

CONTRACT DISPUTES ACT

SEC. 8. Nothing in this Act or the amendments made by this Act shall be deemed to affect any agency board established pursuant to the Contract Disputes Act (41 U.S.C. 601), or any other person designated to resolve claims or disputes pursuant to such Act.

EFFECTIVE DATE

SEC. 9. Except as otherwise provided, this Act and the amendments made by this Act shall take effect on the date of enactment.

Senator Heflin. Senator Thurmond, do you have an opening statement you want to make?

OPENING STATEMENT OF HON. STROM THURMOND, A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA

Senator Thurmond. I have a very brief statement, Mr. Chairman.

Mr. Chairman, I am pleased to participate in this hearing on your bill, S. 950, the Administrative Law Judge Corps Act. The issues surrounding this Nation's reliance on administrative law judges are worthy of this subcommittee's attention, and I commend you for your leadership in this area.

S. 950, the Administrative Law Judge Corps Act, is a result of many years of thought and study by our chairman in an effort to make the administrative law process more efficient and effective. This bill would take the more 1,000 administrative law judges from their respective departments and agencies and join them together in one giant corps.

I share the chairman's desire to ensure that all individuals have a prompt and fair opportunity to bring their cases before the proper administrative authority. However, I do have some reservations about whether this proposal will accomplish our goal of improving the administrative law forum for all citizens. I shall keep an open mind on this subject.

I welcome our distinguished witnesses today and look forward to their testimony. Thank you, Mr. Chairman.

Senator Heflin. Thank you.

We would appreciate it if witnesses would limit themselves to a 5-minute summary. Their written statements will be entered as a part of the record in their entirety.

We have first a panel: Judge Leonard E. Baloun, who is the president of the Association of Administrative Law Judges, Inc., from Spokane, WA; Judge Joyce Barlow, Association of Administrative Law Judges, Inc., Newark, NJ; and Judge Francis J. O'Byrne, chief judge, Office of Hearings and Appeals, Social Security Administration, Chicago, IL.

We would be delighted to hear from you. Whichever one of you wants to take the lead would be fine.

STATEMENTS OF A PANEL CONSISTING OF LEONARD E. BALOUN, PRESIDENT, ASSOCIATION OF ADMINISTRATIVE LAW JUDGES, INC., SPOKANE, WA; JOYCE KRUTICK BARLOW, ASSOCIATION OF ADMINISTRATIVE LAW JUDGES, INC., NEWARK, NJ; AND FRANCIS J. O'BYRNE, CHIEF JUDGE, OFFICE OF HEARINGS AND APPEALS, SOCIAL SECURITY ADMINISTRATION, CHICAGO, IL

Judge Baloun. Why do I just not make the introductory statement? You have already introduced the two distinguished judges to my right. Other than the fact that I have traveled 2,500 miles——

Senator Heflin. If you will bring that microphone a little closer to you——

Judge Baloun. I say other than the fact that I have traveled 2,500 miles to be here today, I will go on my written statement which has been submitted to the committee.

Senator **Thurmond**. It is still hard for me to hear him, Mr. Chairman.

Senator **Heflin**. If you will put the microphone closer to you, we will hear you better, I believe.

Judge **Baloun**. I hope I do not swallow it.

I say other than the fact that I have traveled 2,500 miles to be here today, I will allow my two distinguished judges to the right—Judge Barlow will make the statement, as she is chairman of the Legislative Committee of the Association, and I personally will stand on the written statement.

Thank you.

[Submissions of Judge Baloun follow:]

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My name is Leonard Baloun. I have been an Administrative Law Judge for almost 20 and an attorney for 32 years. I am president of The Association of Administrative Law Judges and represent a majority of the judges in the Office of Hearings and Appeals who hear Social Security and Medicare cases.

I have traveled over 2,500 miles to be here today. It is a pleasure and a privilege for me to address this body on behalf of the Association of Administrative Law Judges, Inc. I speak from my own experience of almost 20 years and as president of the Association.

The primary purpose and aim of the Association, as stated in the constitution, adopted by the members, shall be to promote and enhance the legal protections afforded the claimants or litigants under DH & HS, SSA and OHA hearings process and the Federal Administrative Procedures Act of 1946, as now codified. The protections, designed to give equal justice under the law, include the principles of due process of law and the principle of a full and fair hearing, and shall not be subjected to bureaucratic expediency to the detriment of the claimants' or litigants' rights.

The thrust of the proposed legislation is to provide the public with an efficient, mobile and geographically situated corps of judges, to hear and decide cases falling within the purview of the Administrative Procedure Act (APA), and to do so in a manner that guarantees "due process" and promotes public confidence in the hearing process, free from bureaucratic rationality and hierarchial control.

Administrative law has been an evolving process, especially at the federal level since 1946, yet only three changes of significant substance have been made in 40 years. They were (1) codification of the code (2) the prohibition of ex parte communications in formal evidenciary proceedings and (3) judicial review provisions of the APA to eliminate the defense of sovereign immunity in suits against the government for relief, other than money damages-a major reform in American law.

The statute has withstood the passage of time and changes of the past 40 years since WW II. From its very beginning in 1933, 54 YEARS AGO, THE 1ST FORMAL REPORT PROPOSED, AIMED AT ABUSES OF EXECUTIVE AGENCIES, THE CREATION OF A FEDERAL ADMINISTRATIVE COURT WITH BRANCHES AND APPELATE DIVISIONS. WE DO NOT PROPOSE A COURT, ONLY A CENTRAL PANEL OF ADMINISTRATIVE LAW JUDGES TO COPE WITH A NEVER ENDING SERIES OF JURISDICTIONAL CONTRIBUTIONS BY THE CONGRESS, I.E. THE LATEST BEING THE 1987 OMNIBUS RECONCILIATION ACT ON MEDICARE DUE PROCESS.

ADMINISTRATIVE LAW HAS BEEN AN EVOLVING PROCESS, ESPECIALLY AT THE FEDERAL LEVEL. IT IS NOW TIME TO TAKE ANOTHER SIGNIFICANT STEP TO IMPROVE THAT PROCESS. THE PRESENT ORGANIZATION OF MULTIPLE CORPS OF ALJS ASSIGNED TO A VARIETY OF FEDERAL AGENCIES AND LARGELY CONTROLLED BY SUCH AGENCIES, FEEDS THE PUBLIC PERCEPTION OF A "HIDDEN JUDICIARY" AND UNFAIRNESS IN CASE PROCESSING. IN ADDITION, FROM A MORE PRACTICAL VIEWPOINT, IT RESULTS IN DUPLICATIVE FUNCTIONS, FACILITIES, TRAVEL AND EQUIPMENT, AND PRECLUDES THE TIMELY AND ORDERLY RESOLUTION OF PROBLEMS RELATING TO CASELOAD IMBALANCES AND JUDGE SHORTAGES.

MOREOVER, THE INABILITY OF SOME AGENCIES, CONCEPTUALLY, TO DEAL WITH THE ALJS' DECISIONAL INDEPENDENCE, AS GUARANTEED BY THE APA, HAS RESULTED IN STRAINED RELATIONSHIPS, MISUNDERSTANDINGS, AND IN SOME INSTANCES, LACK OF COOPERATION. FOR EXAMPLE, THE INCREASING CASELOADS AND FISCAL CUTBACKS IN SSA HAVE MAGNIFIED THE CONCEPTUAL DIFFERENCES BETWEEN THAT AGENCY AND OHA'S CORPS OF ALJS, THE FORMER ATTEMPTING INCREASED ADMINISTRATIVE CONTROL IN MEETING ITS PROGRAM GOALS, AND THE LATTER, FOR ITS PART, INSISTING ON FAIR EVIDENTIARY HEARINGS. NEITHER CAN BE FAULTED FOR THEIR RESPECTIVE ROLES BUT, CLEARLY, SUCH ROLES ARE INCONSISTENT.

THE JUDGES IN SSA HAVE RESISTED PERCEIVED PRESSURES ON, AND INTERFERENCE WITH, THEIR DECISIONAL INDEPENDENCE IN VARIOUS WAYS, INCLUDING THE FILING OF A LAWSUIT AGAINST THE AGENCY (ASSOCIATION OF ADMINISTRATIVE LAW JUDGES, INC. V. HECKLER, U.S.D.C. CIVIL ACTION NO. 83-0124). SUCH RESISTANCE WAS RECOGNIZED BY THE ABA WHEN, AT ITS ANNUAL MEETING IN NEW YORK CITY IN AUGUST 1986, BEFORE AN AUDIENCE OF THIS NATION'S MOST RENOWNED LAWYERS AND JUDGES, INCLUDING JUSTICES OF THE SUPREME COURT, IT COMMENDED THE CORPS FOR ITS OUTSTANDING EFFORTS "TO PROTECT THE INTEGRITY OF ADMINISTRATIVE ADJUDICATION WITHIN THEIR AGENCY, TO PRESERVE THE PUBLIC'S CONFIDENCE IN THE FAIRNESS OF GOVERNMENTAL INSTITUTIONS, AND TO UPHOLD THE RULE OF LAW." THIS WAS THE FIRST TIME THAT THE ABA EVER MADE AN AWARD TO ANY ORGANIZATION OF JUDGES.

I CAN SPEAK FROM RELEVANT EXPERIENCE IN RELATION TO SOME DEFICIENCIES IN THE PRESENT ORGANIZATIONAL ARRANGEMENTS FOR THE USE OF ALJS. THE corps of ALJs in SSA constitute about two-thirds of the entire corps of Federal ALJs and is the largest single organization of judges in the country. They hear and decide cases for the Secretary of DHHS, but is organizationally controlled by SSA because most of the cases it hears are Social Security cases, primarily disability benefit issues. The wisdom of such an organizational arrangement is subject to question; further, OHA's corps also hears cases involving Retirement Insurance, Black Lung and Medicare cases, as well as Sanction cases. The Medicare cases are heard for Health Care Financing Administration, DHHS, and the Sanction cases are handled for the Office of Inspector General, DHHS. There is a proposal pending to create yet another corps of ALJs to hear the latter cases.

The judges are organizationally housed in the Office of Hearings and Appeals, which is headed by an Associate Commissioner, who reports to the Deputy Commissioner for Programs, SSA, who in turn reports to the Commissioner, SSA. The Deputy Commissioner for Programs, to whom OHA reports, is responsible for the SSA programs in which the ALJs adjudicate cases for SSA. There are approximately 5,000 employees in OHA, of which about 660 are ALJs. The ALJs are assigned to 133 field hearing offices throughout the country and hear cases thereat as well as about 500 remote hearing sites. The ALJs are supported by about 3,000 field staff employees, divided among ten regions. Each region has a Regional Chief ALJ (some of which positions are presently vacant) with support employees. There are about 1,000 employees in OHA's headquarters in Arlington, Virginia. A large part of those employees constitute the appeals segment of OHA.

In fiscal year 1986, OHA received 230,655 requests for hearing and disposed of 220,313 cases, leaving an end-of-year pending caseload of 117,384. A caseload of about 98,000 at any particular time is considered optimum, representing about four months of work for 700 judges. In fiscal year 1987, it is estimated that 278,000 requests for hearing will be filed. As of the end of July 1987, the pending caseload was 151,161 even though individual judge dispositions increased, and the pending will probably reach 200,000 by the end of the calendar year. Why? There are 219,000 CDI cases being prepared for adverse decision; 127,000 already ready, only awaiting a date stamp and mailing. The average processing time per case has increased from about 170 days in October 1986 to 202 days in May 1987. This will increase even further.

As you can see, because of a reduction of the ALJ corps in OHA, the judges are building a backlog of cases. The primary cause of the continuing reduction in the corps of OHA judges stem from two factors: viz., (1) over 40 percent of the corps is eligible to retire, and (2) OHA's judges are at the GS-15 level of compensation and most other

JUDGES IN THE OTHER AGENCIES ARE AT THE GS-16 LEVEL; ACCORDINGLY, AS VACANCIES OCCUR IN OTHER AGENCIES, OUR JUDGES TRANSFER TO THOSE OTHER AGENCIES TO FILL THE VACANCIES. ANOTHER PROBLEM AREA IS THAT CASELOAD IMBALANCES DEVELOP DUE TO JUDGE SHORTAGES AND CHANGING SOCIO-ECONOMIC CIRCUMSTANCES AFFECTING HEARING REQUESTS.

AS A RESULT OF THE ABOVE CIRCUMSTANCES, PROMPT DECISIONS MUST BE MADE CONCERNING HEARING TRIP ARRANGEMENTS FOR JUDGES; THE HIRING OF REPLACEMENT JUDGES; AND THE PERMANENT TRANSFER OF PERSONNEL, INCLUDING JUDGES, TO NEEDY HEARING OFFICES. MY EXPERIENCE IS THAT, PRESENTLY, SSA HAS NOT BEEN ABLE PROMPTLY TO RESPOND TO THE VARIOUS CRISES THAT ARISE WITHIN OHA AND, BY THE TIME IT DOES RESPOND, THE CIRCUMSTANCES HAVE AGAIN CHANGED, REQUIRING NEW AND MORE APPROPRIATE DECISIONS. FOR EXAMPLE, RECENTLY IT HAS TAKEN SSA ABOUT SIX MONTHS TO RESPOND TO ALJ TRANSFER RECOMMENDATIONS. SIMILARLY, OHA'S PAUL ROSENTHAL, CHIEF JUDGE, ATTEMPTED SEVERAL MONTHS AGO TO MAKE ARRANGEMENTS WITH THE NATIONAL LABOR RELATIONS BOARD (NLRB) AND INTERSTATE COMMERCE COMMISSION (ICC) FOR THE TEMPORARY USE OF 20 NLRB JUDGES AND THREE ICC JUDGES. THOSE AGENCIES APPEARED WILLING TO MAKE SUCH ARRANGEMENTS, BUT SSA BALKED SINCE SSA WOULD HAVE TO COMPENSATE THE AGENCIES FOR THE LOAN OF THEIR JUDGES. IN THE PAST, WE HAVE MADE ARRANGEMENTS FOR THE LOAN OF OUR JUDGES TO OTHER AGENCIES AND HAD DONE SO SUCCESSFULLY FOR SEVERAL YEARS, UNTIL EARLY 1987. CLEARLY, IN A UNIFIED CORPS OF ALJS, THE USE OF JUDGES IN ANOTHER DIVISION WOULD NOT PRESENT EITHER AN ADMINISTRATIVE OR EXPENDITURE PROBLEM, OR A LOGISTIC VENTURE IN BUREAUCRACY BETWEEN AGENCIES. IN ADDITION, MANY JUDGES HAVE EXPERIENCE HEARING CASES IN MORE THAN ONE AGENCY.

SIMILARLY, THE LOSS OF SSA JUDGES TO RETIREMENT AND OTHER AGENCIES REQUIRES THE PERIODIC HIRING OF NEW JUDGES. IN 1983, SSA HAD 797 ALJS AND, AS NOTED ABOVE, THE NUMBER HAS DWINDLES TO ABOUT 660. THE LAST GROUP APPOINTED TO OHA OCCURRED IN EARLY 1986 AND CONSISTED OF ABOUT 35 JUDGES. DESPITE THE CONTINUING ATTRITION AND RECOMMENDATIONS FOR THE APPOINTMENT OF ADDITIONAL JUDGES, NO ARRANGEMENTS HAVE BEEN MADE THUS FAR. IT GENERALLY TAKES A NEWLY HIRED ALJ IN OHA ABOUT NINE OR TEN MONTHS TO BECOME PRODUCTIVE.

TO SUM UP, A UNIFIED CORPS OF ALJS TO HEAR ALL FEDERAL AGENCY CASES, BUT DIVIDED INTO APPROPRIATE DIVISIONS, WOULD PROVIDE THE PUBLIC WITH AN EFFICIENT AND HIGHLY RELIABLE HEARING PROCESS DEVOID OF THE POTENTIAL FOR AGENCY INTRUSION IN SUCH PROCESS. THE CORPS WOULD NO LONGER BE A "HIDDEN JUDICIARY" AS SOME HAVE CALLED IT, AND WOULD PROVIDE A PROPER BALANCE BETWEEN AGENCY NEEDS AND THE PUBLIC INTEREST. ON MY OWN BEHALF AND ON BEHALF OF THE ASSOCIATION OF ADMINISTRATIVE LAW JUDGES, INC., I URGE SUPPORT FOR THE UNIFIED CORPS BILL.

Senator HEFLIN. Thank you, sir.

STATEMENT OF JOYCE KRUTICK BARLOW

Judge BARLOW. Good morning, Mr. Chairman, Senator Thurmond. I am pleased to appear on behalf of the Association of Administrative Law Judges this morning. I ask not only that my written statement be made a part of the record, but my oral testimony before this subcommittee in May of 1986 also be made a part of this record.

Senator HEFLIN. Without objection, it will be.

Judge BARLOW. This morning, I would like to address myself to some of the critiques of the bill.

Senator THURMOND. I can hear you better, but it would still help you if you get closer to the microphone.

Judge BARLOW. I would like to address myself this morning to some of the critiques or critics of the bill. In May 1986 when this bill was last before the committee, one opponent said, "If it is not broken, do not fix it." To that individual and to the other opponents of this bill I say, have you ever heard of preventive medicine? Preventive medicine saves lives and money.

The best evidence of the problems requiring fixing appears in the Social Security Administration, and I think there can be no doubt that we have many problems, some of which I have enumerated extensively in my written testimony and in the exhibits which I have given, indicating interference in judges' decisional independence.

However, it must be made clear to everyone that problems exist in other agencies—for example, the National Labor Relations Board, the very agency that is the primary opponent of this bill.

While neither I nor my colleagues appearing on behalf of this bill approve of production quotas, for example, we have heard that by its own admission the NLRB has been wasting millions of dollars per year because they say that 12 decisions per judge is a minimally acceptable standard. However, NLRB judges are only producing approximately six cases per year. This in itself shows that problems exist there.

It has been said by critics of the bill that we do not need a corps because judicial independence is already protected by the APA. The courts hearing cases concerning the issues arising under the Bellmon amendment in Social Security have made abundantly clear that the APA has failed to protect judicial independence in the appropriate fashion.

Judges are harassed because of their attempts to achieve decisional independence. Judges in Social Security have been put on permanent travel status when they failed to "produce" the number of cases appropriate. Judges have been brought in here to Washington to be taught how to deny cases and held in a room in central office with non-lawyer analysts and taught how to write denial opinions.

The very people who oppose the bill say that pay and classification are established by OPM. How, then, do they explain the harassment of former Chief Judge Paul Rosenthal when he filed a petition with OPM for reclassification of SSA ALJ's to a GS-16, and when the agency, through Mr. Louis Enoff, requested orally that he leave the post of chief judge and, when he refused, placed so much pressure on him that ultimately for the benefit of him and his family he did resign as chief judge?

To the opponents who say that only SSA experiences pressures regarding the outcome of decisions, we ask what about the pressures of ex parte communications that we are aware of?

For example, it is my understanding that Judge Fenton's reply to this committee previously that he was unfairly accused of ex parte communications with the chairman was not correct. In fact, he admitted to conversations with two commissioners.

To those who deny the efficiency of the corps, we reply that this is a way to eliminate duplication of services, duplication of office space, management personnel, photocopying equipment, not just administrative law judges.

For example, in the Social Security Administration within the last few years, a hierarchy of middle management has been created through the reconfiguration process where we now have more chiefs than Indians. We have secretaries who have been promoted to supervisors to supervise pools that run inefficiently.

The amount of money that will be saved in salary because of the ability to combine these services is enormous. On this point, I would like to point to the experience of the State of New Jersey, a State to whose bar I belong. I am cognizant of the process in the State of New Jersey and know well several State administrative law judges.

When that bill was first proposed in New Jersey, every single administrative agency objected, claiming the same issues that are being claimed here today. Five years later when the State of New Jersey's legislature met to investigate and report to the Governor, not one agency objected to the continuance of the unified corps. They all found that expertise was retained and that their cases went through the process in a more speedy fashion and enormous amounts of money were saved.

In establishing a unified corps and utilizing the 139-or-so Social Security Administration hearing offices across the country to accommodate hearings for other agency matters, we would be providing litigants with hearing sites close to home in almost every single administrative matter that comes into the arena.

Contrary to the critics' contentions, expertise will not be lost. The divisions adequately provide for the retention of expertise, again, as the New Jersey experience has shown. The divisions have been established with a view towards combining judges from agencies with similar caseloads.

For example, could anyone reasonably argue that a judge in the Nuclear Regulatory Agency would not be capable of hearing Federal Energy Regulatory Commission cases, if necessary?

Could anyone argue that an SSA judge is not capable of hearing DOL cases when, in fact, 40 percent of the current DOL judges come from SSA and when the loan program on numerous occasions has provided for SSA judges to hear DOL cases?

Senator **HEFLIN**. If you could summarize in about 30 seconds, since we do have a time problem.

Judge **BARLOW**. Certainly, certainly.

There have been many criticisms, but I would like to say in closing that every day the ALJ touches human lives, whether in labor, whether in environmental disputes, health, safety, or wherever we go.

Today, this committee has the opportunity to pave the way for the future of the administrative judiciary. This measure is as important as the APA itself and I urge its passage.

Thank you.

[Submissions of Judge Barlow follow:]

STATEMENT OF POSITION OF THE ASSOCIATION OF ADMINISTRATIVE LAW JUDGES TO THE SENATE SUBCOMMITTEE ON COURTS AND ADMINISTRATIVE PRACTICE

Presented by
Joyce Krutick Barlow
United States Administrative Law Judge

Members of the Committee:

It is my privilege to appear before you on behalf on the **Association of Administrative Law Judges** to address you on a bill which may well become one of the greatest contributions to the American system of justice in this era. I refer, of course, to S. 950, **"The Administrative Law Judge Corps Act"**.

Introduction

When the bill was initially introduced, it was the hope of those who supported it that the difficulties engendered by those individuals who must look to the Administrative Judiciary to redress breaches of federal regulations would be greatly reduced. On June 13, 1984, this subcommittee favorably reported the same bill (then S. 1275) and requested that it be placed on the agenda with all due speed.

Almost two years later, there have been no changes which would mandate a different result. In fact, certain events which will be discussed at length have created an atmosphere most conducive to the passage of this measure during the current session of Congress.

On May 13, 1986 I had the privilege of testifying on this matter before the subcommittee. This statment is substantially the same as my previous statement, however there have some changes and additions necessitated by events occuring subsequent to my prior testimony.

As previously noted, my appearance is on behalf of the **Association of Administrative Law Judges**, and the opinions expressed herein are not opinions of the agency to which I am assigned. Furthermore, I appear before you today having utilized my personal annual leave time.

The Bill: A Summary of Its Provisions

The creation of a **Unified Corps of Administrative Law Judges** staffed by all those Administrative Law Judges currently in office is the end product of this legislation. The Corps would be comprised of **all** the Judges presently assigned directly to approximately 29 federal agencies, and presided over by a **Chief Administrative Law Judge** in conjunction with the **Council of the Corps** (the policy-making body of the Corps). A minimum of four and a maximum of ten divisions would be created to which judges would be assigned according to their areas of specialization.①

The responsibilities of the Chief Administrative Law Judge would include making written reports to the President concerning the business of the Corps during the preceding fiscal year, as well as presiding over the Council of the Corps. It would be the function of the Council to transact day to day business by a vote of a majority of all the members of the Council. Its areas of responsibility would include the hiring of judges, filing of disciplinary actions against judges, adoption of rules of practice, issuance of regulations concerning the conduct of business, determining general Corps policy, and to appoint and employ support staff. Ancillary powers such as the power to enter into contracts, and provide for continuing judicial education, are also included in the appropriate portion of the bill.

A judicial " Nomination Commission " is provided for with stringent guidelines set forth for the selection and appointment of a Chief Judge. It would be this commission's responsibility to report to the President with a list of three individuals found to be qualified for the position.

Provisions have been made for the appointment and transfer of judges in keeping with current APA standards. Jurisdiction is conferred upon the judges assigned to the Corps to hear and decide such cases which have heretofore been heard by them. Further, the bill unequivocally directs that all of the types of cases heard by administrative law judges on the date of the enactment of the legislation shall be heard by the judges assigned to the Corps.

Provisions for removal and discipline of judges is spelled out, and for the first time, criteria for this controversial area are set forth in a clear and concise manner. ②

Lastly, the bill provides for a review and report on the progress of each division, in consultation with the Chief Judge, Division Chief of the reporting division, as well as the appropriate agency (and others specified), and, appropriate measures to transfer all existing staff, employees, facilities, etc., from the agencies to the Corps.

Why an Independent Corps? Is there a real need?

A reorganization of the administrative judiciary into a unified corps would provide the public with an assurance of the independence of the Judge, as well as saving substantial sums of money.

Most recently, the issue of independence has been the topic of serious consideration within the Department of Health and Human Services - Social Security Administration. However, it is by no means confined to this agency. Not too long ago, a judge in one of the regulatory agencies told of a litigant who appeared before him pro se and in effect refused to proceed because that judge was employed by the very agency who was seeking to impose sanctions against the litigant. In the same context, a litigant before the Department of Agriculture said of an unfavorable Administrative Law Judge decision "I think it was because he does work for the Department of Agriculture. He felt a lot of pressure. He was on the Department of Agriculture team. You always vote with your team don't you? He wasn't a bipartisan judge. He is an administrative Judge for the Department of Agriculture."(2a) The **American Bar Association, in its Canons of Judicial Conduct, requires a judge to avoid even the appearance** of an impropriety, and yet the assignment of an Administrative Law Judge to the agency whose cases he or she is to decide makes it virtually impossible for the Judge to avoid the appearance of an impropriety.

In testimony adduced before this subcommittee on May 13, 1986 (re: S 673 the sister bill to this legislation) it was reported that the Federal Trade Commission has been the subject of similar criticism. In the KELLOG case, according to one witness, an agency apparently entered into a $50,000 per year contract with a retiring judge to finish a proceeding which he had begun prior to retirement (this judge allegedly had a history of making rulings favorable to the agency). Needless to say, one can understand the defendant's refusal to believe that this judge could be fair and impartial considering the fact that the agency retained the power to terminate his contract of employment. The same witness related that in the KID VID case the chairman of the same agency (FTC) attempted to have a certain judge appointed to hear the case. That judge, in fact had aided in drafting the very complaint (during his service as an FTC Staff attorney) which served as the jurisdictional document in the case he was to hear.

It is difficult for most laymen to comprehend that a judge employed by the very agency that is a party to the litigation can and will be impartial and fair. The fact that in the past few years the Social Security Administration has been embroiled in front page publicity, which casts in doubt the independence of the administrative judiciary, has made it even more difficult for the laymen to accept this concept.

It is abundantly clear that the most egregious conduct concerning interference with decisional independence has occurred within the Social Security Administration. In September 1982, the Associate Commissioner introduced a program which was designed to work with the Bellmon review. It was known as a feedback program. As one Judge described it in his testimony in a Joint Hearing of the House Subcommittee on Social Security and the Senate Special Committee on Aging held on March 24, 1984 in Hot Springs Arkansas, "It would be a system whereby individual ALJ's would be advised of their 'decisional weaknesses,' and provided with a 'mechanism for long-term improvement.' [The] memorandum provided for a timetable for improvement, failing improvement within certain steps and after certain training and counseling, the memo promised that 'other action would be taken.'[3] As early as 1980, the Administration began discussing with Judges in Ft. Smith, Arkansas the fact that they had significantly higher allowance rates than other offices in their area.[4] At a trial in the United States District Court for the District of Columbia, (in the winter of 1984) two Judges in the Fort Smith hearing office testified that the Deputy Director of the Office of Appeals Operations informed them that the only way to be free of the agency's continual peering over their shoulder was to lower their reversal rates (then in the 90% range) to the national average of 45-55%.[5] The decision in this litigation written by the Hon. Joyce Hens Green, is perhaps one of the most significant documents in support of the need for an independent corps of administrative law judges. In her words:

> ...the evidence as a whole, persuasively demonstrated that defendants retained an unjustifiable preoccupation with allowance rates, to the extent that ALJs could reasonably feel pressure to issue fewer allowance decisions in the name of accuracy. While there was no evidence that an ALJ consciously succumbed to such pressure, in close, cases, and, in particular, where the

> determination of disability may have been based largely on subjective factors, as a matter of common sense, that pressure may have influenced some outcomes.[6] (emphasis added)

Interestingly, while Judge Green dismissed the claim of this Association upon the ex parte representation of the government that the so called "Bellmon Review" would no longer be utilized to rank and evaluate judges, we find that **Bellmon Review** is "alive and well and living at OHA". Recently one of the past presidents of this Association learned that a "quality review" predicated upon **Bellmon** was in place. This "quality review" compiled region by region, gave a percentage rating for the quality of a judge's work, and gave each hearing office a percentage rating. Each judge in the Social Security Administration has had his or her work evaluated and percentage ratings on a scale of 100 assigned to a) appealed affirmations; b) allowances; c) unappealed affirmations; and d) a **total** composite accuracy rating. A copy of such a report, bearing a June 1986 date is submitted as an exhibit to this statement. What is most interesting about the report is the fact that Mr. Jay Ogden, of the OHA office of Appraisal stated to the Board of Directors of this Association that the report was not accurate as to the percentages assigned to individual judges but was accurate as to the hearing office as a whole. Without at this juncture discussing the issue of the "establishment of performance appraisal systems", (which will be dealt with infra) the compilation of such statistics may well constitute an invasion of each individual judge's rights to privacy. Each individual judge is named, and a percentage as to accuracy in certain areas is assigned. Apparently, and according to Mr. Ogden, the cases which were reviewed were reviewed by non-lawyer analysts (with the exception of 1 attorney analyst). The preface to this report clearly indicates that it is prepared under the auspices of the **Bellmon Amendment** stating that the amendment requires the Department of Health and Human Services to implement a program of review by the Secretary upon his own motion of hearing decisions under Section 221 (d) of the Social Security Act. Nowhere does the **Bellmon Amendment** require a program which would assign accuracy rates to individual judges. The amendment merely requires individual cases to be reviewed with a view to reversing or remanding if the decision is found to be improper or inadequate. While the **Quality Report** purports to be a part of the implementation of the **Bellmon** program, in fact it is clearly beyond the scope of Congressional intent, and in violation of the **Administrative Procedure Act**. 5 U.S.C. 4301 and 5 U.S.C. 4302, when read together, provide that each government agency is required to develop performance appraisal systems which would be utilized to assist in training, retraining, and possible merit increases. However, **administrative law judges are specifically excluded.** [see 5 U.S.C. 4301 (2)(D)] Thus, even giving the Secretary the benefit of the doubt, were this program to be used to evaluate the need for training, (as Mr. Ogden contends) it is specifically prohibited by statute.

Neither the Board of Directors of this Association nor the individual judges have been told when this review began, when an accuracy rating first began being assigned to individual judges, or what standards were used by those who performed the review.

Notwithstanding the fact that the review is patently illegal, (the **Bellmon Review** was declared unconstitutional in W.C. v. Heckler, No. C 83-865R, U.S.D.C., W.D.Wash, 1/15/86 and Stieberger v. Heckler, No. 84 Civ 1302(LBS) , U.S.D.C., S.D.N.Y., 8/19/85) it goes on unhampered and unimpeded.

In early 1987 former SSA Chief Judge Paul Rosenthal filed a petition with the **Office of Personnel Management** to seek grade increases for the Administrative Law Judges. The petition would place the SSA Judges on par with the other Federal Administrative Law Judges assigned to 28 other agencies, raising the grade from GS 15 to GS 16. In addition, the petition seeks to raise the grade of the Chief Judge who supervises almost 800 Judges from GS 16 to GS 18, and to elevate Regional Chief Administrative Law Judges who supervise approximately 100 Judges to GS 17 from GS 15. The action coincided with the Quadrennial Pay Commission recommendation for increases in Congressional and Article III Judicial salaries.

Very shortly after the filing of the petition, the Commissioner of the Social Security Administration, Dorcas Hardy, acting through her representative Louis Enoff requested the resignation of Judge Rosenthal (the source of this information is Judge Rosenthal himself). The basis for this request was that the Agency objected to any grade increase for the Judges. When Judge Rosenthal refused to resign, he was ordered out of the Washington DC area at a time when the Regional Chief Judges were to meet at a meeting which he planned and for which he created the agenda and expected to preside over (Commissioner Hardy recently denied this set of facts in a letter to Senator Bill Bradley. A copy of the series of letters is annexed).

In addition, he was ordered not to attend the mid year American Bar Association meeting in New Orleans (an organization to which he belongs as a member). Here too, Commissioner Hardy has denied these allegations, however the source of my information is Judge Rosenthal himself.

Judge Rosenthal's object in filing the petition with OPM was simple. This agency has been unable to recruit talented and capable individuals to serve as Administrative Law Judges because the salary is not competitive with other Judicial salaries (for example, in the state of NY, County Court Judges will soon be be earning over $100,000 per year).

The filing of this petition by Judge Rosenthal was clearly within his authority as Chief Judge.

Agency harrassment of Judge Rosenthal caused him to reconsider his refusal to resign. He terminated his service as Chief Judge March 15, 1987 and returned to the Santa Ana Hearing Office. Commissioner Hardy has taken the position that Chief Judge Rosenthal resigned of his own volition to return to Southern California.

During the height of the Bellmon Review Congress and the Courts became concerned that the public was being deprived of due process when cut backs in staffing were accompanied by significant increases in the Social Security work load (much the same situation as we have today). Significant pressures were placed upon the adjudicative branch of the agency (the Administrative law Judges) to increase productivity in order to keep pace with the ever increasing backlog.

In June 1983, Senators Levin and Cohen became so concerned with the increasing pressure for productivity that hearings were held by the Senate Subcommittee on Oversignt of Government management of the Committee on Governmental Affairs. Their report, issued September 16, 1873 found that:

> "SSA is pressuring its ALJ's to reduce the rate at which they allow disabled persons to participate in

> or continue to participate in the Social Security disability program.
>
> ...
>
> The Subcommittee also finds that the SSA is imposing this pressure through several means including the inequitable and unjustified targeting of only allowance decisions and high allowance judges for review pursuant to an amendment sponsored by Senator Henry Bellmon and passed in 1980 (Bellmon Review), and the use of minimum production quotas and productivity goals. (emphasis added)

The committee recommended that the Bellmon Review be immediately discontinued, that SSA immediately stop all managerial and administrative and policy related activity directly or indirectly aimed at influencing the ALJ's allowance rates, and that the propriety and legality of the SSA's actions regarding ALJ productivity. To date none of these recommendations have come to pass.

It is importent to keep in mind the recommendations of the Cohen and Levin Report as their committee's findings bear directly on the current situation.

In the component of SSA known as OHA (the Office of Hearings and Appeals) Commissioner Hardy, through her recently appointed Associate Commissioner for the Office of Hearings and Appeals has made increased productivity the focus of her efforts. Throughout the nation, Regional Chief Administrative Law Judges have circulated written memoranda directing the Judges to produce more decisions each month with less support staff (an example of this is annexed). Judges have been directed to produce a minimum of 35 decisions per month per Judge, irrespective of staffing difficulties. In the hearing office to which this writer is assigned, the months of February 1987 and March 1987 saw typing backlogs of over 100 cases (in an eight Judge office) yet we were being directed to "produce more".

In his effort to comply with the directives of Commissioner Bradley, the Regional Chief Judge of Region II directed one hearing office to reduce the usage of medical advisors and vocational experts in the disability hearings as this would decrease processing time and increase productivity. In his words **"The HO Chief Judge must address this issue and implement procedures for reducing the office's overall MA/VE usage. In effect, this will increase the office's overall productivity by reducing the time needed per disposition per ALJ."** (see Memorandum and its attachment of L. Charles Leonard, RCALJ, dated March 10 1987). The fact that this policy is a direct intrusion into the decisional independence of the Judge as provided for by the Administrative Procedure Act is totally ignored. The fact that this directive violates decisions of the Courts of Appeal in all the circuits is ignored, and the fact that it violates the dictates of this Congress as mandated by the Disability Reform Act of 1984 is ignored.

While Commissioner Bradley told the Board of Directors of this Association that she is "not about the business of setting quotas" (a comment made in her presentation at the Board Meeting in Washington, DC on March 30, 1987), that is precisely what she is doing. And, it is clearly depriving the public of the high level of services to which it is entitled, and intruding into the province of the judge who must take shortcuts if he or she is to reach the "goal".

Only a few days after Ms. Bradley made the statement that she is "not about the business of setting quotas", she met with the Hearing Office Chief Judges and their Hearing Office Managers in Region II (NY City). According to reports from judges who were present, the meeting was devoted entirely to ways to increase productivity and reach the "goal" of 35 dispositions per ALJ/per month for this fiscal year, and 40 for FY '88. During this meeting, and in the presence of Acting Chief Judge Rucker and Regional Chief Judge Leonard, and with their approval, Judge Fredrick Harap of White Plains, NY suggested that his colleagues follow what he has done in his office. Judge Harap reported that lists of the exhibits were no longer being prepared (notwithstanding the fact that the OHA handbook requires a list of exhibits which are presented to the ALJ). He also advised that the Judges in his office do no pre hearing or post hearing development of the record (notwithstanding the fact that the APA requires a Judge to develop the record both for the government and for the claimant). Another method he instituted to cut processing time and increase productivity was to refuse attorneys' requests to hold the hearing record open for additional evidence in cases where the attorney had been representing the claimant for any length of time. Judge Harap suggested that other offices adopt his practice of refusing to answer telephone requests from attorneys concerning the status of a case. When an attorney calls the White Plains office he is told that the request must be put in writing, and if no response is received within a certain period of time, another request marked second request should be sent. This writer was advised by several others present at the meeting that Judge Harap stated that the first request was thrown in the garbage since by the time the second request arrived the case would probably be off the docket. He also reported that his Judges used no medical advisors or vocational experts during the course of their hearings (again, notwithstanding directions by the Courts, Congress, and the regulations to do so). These policies were apparently approved by the Acting Chief Judge and the Regional Chief Judge in as much as they were present during the presentation and did not voice any objections. One must ask these hard questions: Do such cuts provide the kind of services the public is entitled to expect from SSA?; Do such "suggestions" intefere with decisional independence, especially where they result in the non use of expert witnesses or development of the record? This Association answers the first question with an emphatic NO!!! To the second question we empahatically answer **YES!!!**.

There can be no doubt that the original intent of Congress was to create an administrative judiciary which while employed by the agencies it serves was expected to maintain its decisional independence. The experience of the past few years has amply demonstrated that employment by the very agency whose cases one must decide is inconsistent with decisional independence.7 It is imperative that action be taken by Congress to prevent the thwarting of legislative intent. History has shown us that a mere statement or report of a Congressional committee is not sufficient to end such egregious conduct (i.e. As previously noted the report of the Senate Subcommittee on Oversight in the summer of 1984, and headed by Senators Cohen and Levin, recommended that **"The SSA immediately discontinue all Bellmon Review activity;..."**). Action must be taken by Congress to remove administrative law judges from supervision by the agency whose cases they hear. It is the only way to protect the intent of the Administrative Procedure Act insuring the independence of the administrative law judge.

In 1981, the Judicial Administration Division of the ABA published a report entitled THE IMPROVEMENT OF THE ADMINISTRATION OF JUSTICE. In discussing the independence of the administrative law judge, one portion of the report stated:

> ... It is not too much to say that due process would require, if the independence of the trier of facts is tainted, that no weight or effect whatever be given to his decisions. A decision by a judge who is under the influence of one of the disputants would lack the most elementary basis of actual or apparent fairness.[8]

More recently, the American Bar Association in response to the recommendation of John H. Pickering, Chairman of the Commission on Legal Problems of the Elderly an award was issued to the Administrative Law Judges of the Social Security Administration. While the entire memorandum from Mr. Pickering is annexed, it is appropriate to quote certain portions.

> "The Commission on Legal Problems of the Elderly hereby requests the American Bar Association Board of Governors to approve a one-time special recognition for the Administrative Law Judge Corps of the Social Security Administration (SSA) in recognition of their efforts to maintain the judicial independence expected of such functionaries in the face of various pressures to compromise objectivity and join in reducing the number of disability benefit allowances of the agency during the period from 1982-1984.
>
> The action of these ALJs during the period in question enabled many claimants to receive full and fair consideration of their eligibility for benefits and provided needed relief from policies and practices of the social Security Administration which would have resulted in unjustifiable denials of benefits to thousands of disabled citizens who lack adequate means of financial support. The objectionable SSA policies attracted national concern. The Congress, the courts, and the Social Security Administration itself have addressed many of the problems which arose during the period and significant improvements have been made.
>
> In maintaining appropriate judicial objectivity, the 800 members of the Social Security ALJ corps evidenced a respect for the rule of law, protected the integrity of administrative adjudication within their agency, and preserved the public's confidence in the fairness of governmental institutions on a scale that has rarely been equalled in American adjudication. In so doing, they provided an extraordinary demonstration of the wisdom and viability of the 1946 Administrative Procedure Act and its protection of the administrative process which one past president of the ABA has described as 'literally our administrative bill of rights.'
>
> ...
>
> Despite the pressure felt by many ALJs to increase the rate at which they affirmed SSA

> benefit denials it is a matter of history that they largely maintained their traditional affirmance/reversal rates and, presumably, the objectivity of administrative adjudication within the SSA disability program.
>
> ...
>
> It is a tribute to the profession and its fidelity to the rule of law that the Social Security ALJs, during a period of great systemic strain, continued to insure that the processes they used to hear cases and render decisions were not compromised by pressures to stress 'quantity' or to respond to extra-judicial budgetary concerns of SSA in individual case adjudication (however legitimate these considerations might have been as matters of general agency policy.) This was in the best tradition American judicial officers discharging sworn obligations in times of public clamor and governmental flux. ..."

It had been the hope of the Courts, (Judge Joyce Hens Green in particular) that such conduct would be a thing of the past. But - alas ! Those hopes were not to be fulfilled. The Quality Review is the first evidence of this fact. In addition, in a memorandum dated July 29, 1986 (annexed hereto) the well worn Quality/Quantity Equation surfaces again. In this memorandum, the Associate Commissioner for the Office of Hearings and Appeals, Mr. Frank Smith III, wrote that we had made good progress due to the reduced case load, but that the increase in hearing receipts over the previous five month period threatened to "destroy the balance" between "quality and quantity." Presupposing that judges do not write decisions (because we utilize the services of attorneys and non-attorney decision writers for the bulk of the work) Commissioner Smith suggests that judges assist in drafting decisions. While I cannot speak for all Social Security judges, those I do know personally do a substantial portion of the writing. What is particularly troublesome however, is the fact that the Commissioner suggests we use HA's (hearing assistants), to write decisions. While our hearing assistants are trained for their particular job, most are not college educated and have not been trained to encourage writing skills. As a judge who has been a member of the bar since 1969, this writer has great difficulty accepting this suggestion. While on an individual basis some hearing assistants may be quite capable of writing certain types of documents, a judicial opinion which needs an involved rationale which will satisfy the judges of the United States District and Circuit Courts requires the talents of a trained professional writer. The general tenor of this memo is again that often ill used word "productivity". There can be no doubt that every government employee will have to pitch in to take up the slack that the Gramm-Rudman-Hollings deficit reduction movement has caused. However, when it comes to due process and the protection of claimants' rights, we the Administrative Law Judges of the United States will not sacrifice quality for quantity. There can really be no balance between the two, as quality must come first.

Mr. Pickering, in his memorandum recommending the special recognition for the Social Security judges made reference to a former ABA president who described the administrative procedure act as an "administrative bill of rights". That man, Mr. Bernard G. Segal, as early as the 1970's called for a unified corps of administrative law judges. His words, although some 10 years old are pertinent today.

> "... the emergence of the administrative law judge as a public figure will inevitably place heavier responsibilities on both the judge and the system.
>
> How then do we accelerate the process of attracting the most qualified people to the administrative bench, and how do we improve the system under which they operate? I urge that we begin by completely divorcing administrative law judges from their agencies by the establishment of a unified corps of administrative law judges..." (article annexed)

If the general public is to be well served by the administrative judiciary, then its independence must be assured by severing the judges' employment from the agencies.

The Corps - An Efficient and Cost Effective Management System

At the present time, each agency employing Administrative Law Judges functions entirely on its own. Thus at periods of peak case load, agencies are often faced with the need to hire new judges and staff to support those judges. In fact, the Social Security Administration recently hired 36 new judges in order to fill vacancies created by retirments and transfers of a number of judges to the Department of Labor. On the other hand, during periods of low receipts in requests for hearing, the judges in a particular agency may have little work. It is also note worthy that the Secretary of the Department of Health and Human Services has undertaken to create a separate corps of judges for the Health Care Financing Agency to hear HCFA's cases, notwithstanding the fact that SSA judges have been able to handle these cases without difficulty (in 1986 the agency received 5,382 requests for hearing in medicare cases and anticipates 6,392 requests in 1987. The SSA judges disposed of 4,824 such cases in 1986 and anticipate disposing of 6,312 in 1987.) To create another corps of judges within the same agency, requiring substantial expenditures of funds for administration, secreterial and clerical help, and training of new judges, not to mention hiring costs for all these people is an unnecessary expense which could be avoided by the utilization of a Unified Corps system.

At the present time there is no efficient means by which the talents of those judges without sufficient work can be utilized to assist a sister agency. The interagency loan program is burdensome and time consuming in that it requires contract negotiations between agencies for the loan of judges, and extensive recordkeeping regarding judges' and staff members' time so that payment may be made from the borrowing agency to the agency lending the judges. During a twenty month period from October 1983 to June 1985, the Social Security Administration detailed 177 Judges to 16 different agencies.9 (While such details have taken place, the administrative procedures employed to accomplish the temporary transfer of judges has proved to be extremely difficult and cumbersome to use.) The establishment of a "Unified Corps" would eliminate the necessity for bureaucratic red tape when one agency's case load was heavy while another's was light. The Chief Judge would have the power to assign a judge to another division with little more needed than a memorandum, and perhaps travel orders. The expense of tracking time and resources would be eliminated, as would bickering over the "value" of the judge's time. While no figures are available as to what the actual cost of the current practice is, there can be no doubt that substantial savings can be had by the establishment of the Corps.

It has been established in previous testimony before this committee that the problems to which I refer are real, and pressing. For example, in FY 1985, the NLRB Judges disposed of 308 cases after trial. With approximately 100 Judges this amounted to 7.6 dispositions per Judge. (see transcript, hearing May 13, 1986) Similarly, it was established at the same hearing that NLRB had two former FERC Judges, yet refused to release these two to assist in reducing the backlog at FERC when requested to do so. Further evidence adduced at that hearing revealed that the Federal Labor Relations Authority averages 14 dispositions per Judge per year, with the average case length being one or two trial days. This appears to be a clear underutilization of the 11 FLRA Judges. In all of these cited situations, proper utilization of this judicial talent would have resulted in substantial savings to the government.

It is estimated by our Association, and the FEDERAL ADMINISTRATIVE LAW JUDGE CONFERENCE that an overall savings of some thirty (30) million dollars per year will be the net result of the Corps. This figure is predicated upon the fact that the expense to maintain a judge including salary, office space, staffing, and travel costs amounts to $150,000 per judge. Further, there would be a total elimination of duplicate staffing, office space, communications, supplies, etc. There are currently approximately one thousand judges. Considering the current rate of attrition, and the ability to move the judges at will, rather than rehire due to attrition, we arrive at the figure of approximately thirty million dollars per year.

While some critics have assailed the legislation because it provides for a single salary, this in and of itself would not increase the cost of maintaining an administrative judiciary. The explanation for this is a simple one. Most of the judges currently serving are at the maximum salary level, and thus there would be no increase in salary. For those few who would benefit by an increase, the additional cost would be more than made up for by the savings resulting from a more efficient use of personnel. Further, the uniform salary level would assure that the Corps could recruit the most highly qualified individuals, thus providing higher quality service to all agencies.

As a management tool, the Corps has the potential for eliminating one of the greatest areas of controversy, docket management. There can be no question about the fact that much of the controversy in the Social Security System arose as a result of management's push commencing in 1976 for increased productivity of the judges (In 1979, the House SubCommittee on Social Security, chaired by Mr. Pickle reported that due process had suffered by the push for productivity. As previously noted, several years later, Senators Cohen and Levin made the same findings). Productivity is, of course, a justifiable concern. No court system in this country is ever free from the pressing weight of the ever growing backlog. Issue after issue, we find articles in the Judges' Journal (a publication of the American Bar Assn., Judicial Administration Division) dealing with case management and reduction of backlog and delays. The difficulty arises when those seeking to manage the docket are in fact parties to the litigation. There is a fine line between efficient operation of an agency, and improper and undue pressure on a judge from the agency. How can one tell whether the pressure to quickly dispose of a case is due to justifiable concerns for speedy case processing, or rather to a party who would like to see it concluded before the judge probes too deeply during the process known as development of the record (i.e. directions from management judges not to use expert witnesses or hold the record open for additional evidence). Implementation of the Corps increases judicial accountability, since the officials to whom the trial judge will be accountable are other judges who are not parties to the litigation.

Unfounded Criticism

Criticism of the Corps Bill stems from the concerns of a dissident minority among the judges in regulatory agencies that their case load is so complicated that only those steeped in the particular field's law can handle these matters. Such concerns are without merit.

The structure of the Corps provides for divisions which follow the lines of the current agency structure, and require that staffing be handled with due consideration given to the areas of specialization of the particular judge.

Even if such a provision were not contained in the bill, the argument falls flat. The administrative judiciary has often been termed "functionally comparable" to the Article III judges. These were the very words used by the United States Supreme Court, in describing the position of Administrative Law Judge.10 What is most interesting about the comparison is that on the whole, the selection process for the position of Administrative Law Judge is a more rigorous one than for the position of U.S. District Court Judge. When seeking a position on the District Court, the applicant does not have to pass a competitive examination. The applicant for the position of Administrative Law Judge does. The Administrative Law Judge selection process is designed to insure that only the most highly qualified applicants are placed in the position. The varied backgrounds of our Judges correspond to the backgrounds of the Judges sitting in the District Courts. In fact, many Administrative Law Judges have in prior times been Judges of Courts of General Jurisdiction in their home states. Many have also served in several different agencies. One never hears a criticism that a U.S. District Court Judge whose prior background is limited to criminal litigation is not qualified to hear a complex multi district law suit involving securities fraud! Once appointed and confirmed, he or she is presumed to have the capacity to absorb and comprehend matters of law in all fields of practice. Why then should there be such a distinction for the Administrative Law Judge? Remember, it is the District Court Judge who hears appeals from all the agencies regardless of the nature of the claim. Just as they are qualified to hear the full spectrum of cases, so too are the highly qualified Administrative Law Judges, no matter what their background or area of expertise.

In support of this contention, let us examine the breakdown of HHS Judges detailed to other agencies from October 1983 to June 1985. In so doing, bear in mind that HHS Judges hear cases involving the Social Security Administration and Health Care Financing Administration, but, that approximately 90% of the caseload involves disability issues. Also bear in mind that a large number of HHS Judges transfered to HHS from other agencies when the agency in which they had previously served was disbanded. (eg. ICC, OSHA, etc) Leading the list with the largest number of Judges detailed is the FDIC. Fifty five HHS

Judges were assigned to hear complex banking matters. Forty nine Judges heard cases for the Comptroller of the Currency, nineteen for the Department of Labor, nineteen for the Department of Education, nine for the Federal Reserve, six for the Federal Home Loan Bank Board, six for the Department of Treasury, three for the Department of Transportation, two for the Civil Rights Review Authority, two for the Consumer Product Safety Commission, two for the National Credit Union Association, and one each for the Army Corps, NLRB, Interstate Trade Commission, Department of Commerce, and the Commodity Futures Trade Commission. If HHS Judges were not fully competent to hear the complex matters arising from these agencies case loads, surely the individual agency would not have accepted their services.

Conclusion

The history of this great nation demonstrates that we are not afraid of the challenge of social change. The time has come to take a very great step forward to reform a system which has grown to proportions most likely not anticipated by those who created it. That the change is warranted cannot be doubted. The great weight of the evidence supports this urgent need. That this measure is the correct one also cannot be doubted. It provides a cost effective method to insure decisional independence, judicial accountability, and unbiased caseload management. This **ASSOCIATION** urges its passage with appropriate amendments as previously stated.

Respectfully submitted,

Joyce Krutick Barlow

JOYCE KRUTICK BARLOW,
U.S. Administrative Law Judge,
on behalf of the **ASSOCIATION**
OF ADMINISTRATIVE LAW JUDGES

July 21, 1987

FOOTNOTES

1. At a later point in this presentation a suggestion will be made for modification of the structure as it now exists in the present bill.

2. The issue of removal will be discussed at length infra.

2a. *Denver Post*, Sunday August 25, 1984, Sect. C p. 1.

3. Testimony of Judge David Hubbard, S. Hrg. 98-773 Part 3, p. 286. See also ASSOCIATION OF ADMINISTRATIVE LAW JUDGES v. HECKLER, Mem. Op. Green, J. Sept 10, 1984, (U.S.D.C.,DC - Civ. Action No. 83-1024)

4. ASSOCIATION OF ADMINISTRATIVE LAW JUDGES v. HECKLER, *supra*.

5. ASSOCIATION OF ADMINISTRATIVE LAW JUDGES v. HECKLER, *supra*.

6. ASSOCIATION OF ADMINISTRATIVE LAW JUDGES v. HECKLER, *supra*.

7. Annexed are three memorandums which are examples of such interference. In one, the Regional Chief Judge of Region II impliedly sought to impose his own practice of not developing a record on other ALJ's by urging that the subpoena power not be used. In a more recent memorandum, a supervisory staff attorney sought to instruct hearing assistants on the use of vocational experts, suggesting that the hearing assistant make the decision as to when to use such an expert, thus bypassing the Judge. Lastly, while unintentional, one Hearing Office Chief Judge put pressure on the Judges to get that hearing office "out of the basement" on aged cases.

8. *The Improvement of the Administration of Justice*, 6th ed, 1981, p. 295.

ATTACHMENTS TO SENATE STATEMENT

Saturday, Aug 25, 1984 Section C •

BUSINESS

THE DENVER POST

Stanko plants may forfeit inspections

Denver Post Staff Wire Reports

Nebraska Beef Processors, which formerly operated the defunct Cattle King Packing Co. in Adams County, could lose its federal inspections under an order issued in Washington, D.C.

An administrative law judge ruled that federal meat inspection should be withdrawn from Cattle King Packing Co.; Stanko Packing Co. Inc., Gering, Neb.; and Nebraska Meat Packers, Gordon, Neb., the USDA said. All these companies did business under the "Nebraska Beef Processors" trade name, but the Gordon plant is the only one still in operation.

If the U.S. Department of Agriculture withdraws its inspection services, however, it effectively would shut down the plant. Meat that isn't federally inspected cannot be shipped across state lines.

The Cattle King plant, just north of Denver, was closed in February following allegations of serious slaughtering and beef handling deficiencies. In April, Monfort of Colorado Inc., owner of the packing facility site, donated it to the Western Stock Show Association, which said the plant would become the Monfort Research Center.

The Gering plant is under option to the Packerland Packing Co. of Green Bay, Wis., and is not operating. The prospective new owners will have to apply for federal inspection before they reopen, officials said.

Donald L. Houston, administrator of USDA's Food Safety and Inspection Service, said the plants have until Sept. 24 to file an appeal with the USDA judicial officer.

Former Cattle King manager Henry Stanko Jr. was sentenced Aug. 6 to one year in jail and fined $1,000 after pleading guilty to selling adulterated meat.

Rudolph "Butch" Stanko, a cousin and owner of Cattle King, is scheduled to go on trial Sept. 4 in U.S. District Court in Denver on similar charges.

John A. Campbell, the administrative law judge, issued his decision Monday. Inspection was dropped at Cattle King for two years, the Gering plant for 23 months and at the Gordon plant for two years.

Campbell upheld USDA's charges that Cattle King illegally processed adulterated meat, processed cattle that had died before they could be slaughtered and concealed those actions from USDA personnel.

'We're going to appeal that decision.'

Henry 'Butch' Stanko

"We're going to appeal that decision. The judge reluctantly withdrew inspection from Nebraska Beef of Gering. I quote him," Butch Stanko told The Denver Post Friday evening from his home in Gering.

"I think it was because he does work for the Department of Agriculture. He felt a lot of pressure. He was on the Department of Agriculture team. You always vote with your team, don't you?" Stanko said.

"It wasn't a bipartisan judge. He is an administrative judge for the Department of Agriculture."

Stanko blamed the inspection order's inclusion of the Gordon slaughter plant on the fact that Stanko owns a one-half interest in that plant with his father, Rudy Stanko Sr. "That's the only reason he gave," Butch Stanko said of Campbell's decision.

Stanko denied that he has any control over the Gordon operation. He said his interest in this plant is in a blind trust.

As in the past, Stanko defended the Nebraska company's management of the old Cattle King plant. "The Cattle King plant in Denver, which a year ago was employing 400 people and slaughtering around 2,000 head of cows a week for the ranchers of the state of Colorado, has never reopened. They can't even give the plant away."

*

BEST AVAILABLE COPY

Jo[illegible] L.
[illegible]
Kirksvil[illegible]
[illegible]

RECEIVED
FEB 26 1985

United States Dept. o[illegible]
Office of the Hearing Clerk
Washington, D.C.
20250

February 19, 1985

Subject: In re JoEtta L. Anesi d/b/a Jo's Kennel, Respondent-
AWA Docket No. 267

Dear Clerk:

In replay to your letter dated February 13, 1985 copy of which is attached, I reply that I may be only an uneducated layman when it comes to the law, but that I do know that our government is divided into three seperate but equal divisions, that of the Congress which makes the laws, the Executive which enforces the laws, and the judicial courts, which decides the fairness or legality of these laws. This is the reason that I stand upon my constitutional right and insist that my case be heard by only a judicial law judge, and not one from the Department of Agriculture which is the same department which is bringing the case against me.

Please advise the administrative law judge whcih you refer to in your letter of the above date, of my decision, and reply if he is going to honor my constitutional right in regards to this issue.

I have recently been advised by my congressman that I have this constitutional right which can't be infringed upon.

Sincerely,

JoEtta L. Anesi

JoEtta L. Anesi

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DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of Hearings and Appea

File

Refer to: LCL-85A-067

Memorandum

SG-T2

Date March 29, 1985

From L. Charles Leonard, RCALJ
OHA - Region II

Subject Requesting Medical Evidence Directly from the Source

To All ALJICs

We have repeatedly advised our field offices through correspondence and in our yearly Regional Team Visits that all medical evidence should be secured through the State Agency. For those offices that felt that they could receive medical evidence more expeditiously directly from the source, we cautioned staff to advise those sources that OHA was empowered to pay no more than $10.00 for a report. This is the fee that the State Agencies pay for medical reports and we cannot exceed that amount.

From time to time doctors have sent in bills for $25.00 to $100.00 for these reports and we were obliged to ask them to reduce their fee to the allowed $10.00 figure. Recently, an Administrative Law Judge in one of our field offices received a bill for no less than $367.60 as a result of a subpoena to a doctor for medical evidence. My understanding is that the medical office involved is only entitled to subpoena fees. But why get into a hassle with a medical provider. I advise you again to either go through the State Agency for the medical evidence you need or if you go directly to the source, you must advise them that you are allowed to pay only $10.00. Why have the Agency tell the ALJ to pay any sums above the $10.00?

In my own cases, if a claimant's doctor won't cooperate, I write the decision on what I do have. Very rarely do I ever use our illusory "subpoenas."

In connection with the use of subpoenas for medical evidence, I direct your attention to Section I-570 ff of the Administrative Law Judge Handbook. These sections are very specific about the use of subpoenas only in the most unusual circumstances.

L. Charles Leonard
Regional Chief Administrative Law Judge
OHA - Region II

cc: All HOMs

Copy to each ALJ, DW, HA
SHA
4-1-85

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UNITED STATES GOVERNMENT
# memorandum

DATE: April 7, 1986

REPLY TO ATTN OF: Mark Grossman, Supervisory Attorney

SUBJECT: Use of Vocational Experts

TO: All Decision Writers

With the advent of reconfiguration in this office decision writers are advised to confer with the hearing assistants assigned to their units in order to clarify questions that might arise on the use of vocational experts. This is especially important in light of a number of court remands recently received in this office prompted by failure to take vocational expert testimony.

Please reiterate that vocational experts should be scheduled in the following instances:

1. Non-exertional impairments. This includes any emotional or intellectual condition, seizure disorders, hearing or vision problems, environmental restriction (fumes, dust, etc.) manipulative impairments or postural disorders (for further clarification see various rulings, 83-12 and 83-13 being especially useful).
2. When the above limitations are combined with an exertional impairment there is still a need for a vocational expert.
3. When a claimant has lost a limb.
4. Where only a vocational expert can evaluate the skill and exertional levels of past work.
5. Where a claimant's residual functional capacity falls between two exertional levels.
6. Where the issue of vocational adjustment and transferability of skills must be considered.

The above should be considered general in nature. Should hearing assistants have questions on specific cases they would be best advised to confer with the ALJ who is the final arbiter. However, by keeping the above categories in mind, the hearing assistants may well be able to schedule cases with vocational experts without imposing on the ALJ.

I will be available to discuss any questions that may arise.

Mark Grossman

MARK GROSSMAN
Supervisory Attorney

cc: All Administrative Law Judges

TRANSMITTAL BY OFFICE OF HEARINGS AND APPEALS

DATE 4|9|86

TO: *(Name and Location)* [redacted] ALJ's Region II

FROM: JRB

BY:

(Claimant's Name and SSN)

(Wage Earner's Name and SSN) (Leave blank if same as above)

ATTACHMENT(S):

☐ CLAIMS FOLDER (TITLE II)
☐ SSI FILE
☐ DECISION OR ORDER
☐ APPEALS FILE

☐ EVIDENCE
☐ MEMORANDUM
☐ TRANSCRIPT
☐ RECORDING

☐ OTHER *(Description)*

REMARKS

It's nice to be appreciated

FORM **HA-505** (5-83)
Prior editions may be used

☆U.S. Government Printing Office: 1984—421-187/195

American Bar Association

March 16, 1986

MEMORANDUM

To: All Members of the Conference

From: Chairman

Re: ABA Commission on Legal Problems of the Elderly
Proposed Recognition of Social Security Judges

The enclosed six page memorandum from Mr. Pickering is a great tribute to the Social Security judges. At least 130 of them are members of this Conference.

John Pickering, as many of you know, is the Delegate to the ABA House of Delegates from the District of Columbia as well as Chairman of the ABA Commission on Legal Problems of the Elderly.

Judge Francis J. O'Byrne
– Kluczynski Federal Bldg.
Suite 8645
230 S. Dearborn
Chicago, IL 60604

4/4/86

I have never seen anything like this at the Amer. Bar Assn. This is a great tribute to our judges. It is nice to know that there were others who were aware we had been in a war. I've always been proud of our corps and others have noticed.

O'Byrne

American Bar Association

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MEMORANDUM

TO: Charles M. Thompson, Chairman
American Bar Association
Board of Governors
Operations Committee

FROM: John H. Pickering, Chairman
Commission on Legal Problems of the Elderly

SUBJECT: Request for Special ABA Recognition of the Social Security Administrative Law Judges

DATE: March 6, 1986

The Commission on Legal Problems of the Elderly hereby requests the American Bar Association Board of Governors to approve a one-time special recognition for the Administrative Law Judge Corps of the Social Security Administration (SSA) in recognition of their efforts to maintain the judicial independence expected of such functionaries in the face of various pressures to compromise objectivity and join in reducing the number of disability benefit allowances of the agency during the period from 1982-1984.

The action of these ALJs during the period in question enabled many claimants to receive full and fair consideration of their eligibility for benefits and provided needed relief from policies and practices of the Social Security Administration which would have resulted in unjustifiable denials of benefits to thousands of disabled citizens who lack adequate means of financial support. The objectionable SSA policies attracted national concern. The Congress, the courts and the Social Security Administration itself have addressed many of the problems which arose during the period and significant improvements have been made.

In maintaining appropriate judicial objectivity, the 800 members of the Social Security ALJ corps evidenced a respect for the rule of law, protected the integrity of administrative adjudication within their agency, and preserved the public's confidence in the fairness of governmental institutions on a scale that has rarely been equalled in American

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adjudication. In so doing, they provided an extraordinary demonstration of the wisdom and viability of the 1946 Administrative Procedure Act and its protection of the administrative process which one past president of the ABA has described as "literally our administrative bill of rights."*

The Commission solicits and would appreciate your judgment about the appropriate form such recognition could take. However, we would suggest that a citation or resolution commending the ALJ efforts and presented to the SSA Association of Administrative Law Judges at our Association's Annual Meeting in August during this 40th anniversary year of the APA would be highly appropriate.

Background

The SSA hearing system is the largest administrative adjudicatory system in the world, handling over 250,000 cases per year. Three times as many of the nation's 1100 federal Administrative Law Judges (ALJs) serve SSA as all other federal agencies combined.

Federal ALJs hold a unique position protected by the Administrative Procedure Act which insulates their autonomy from certain kinds of pressures. For example, ALJs are subject to removal from their positions only for good cause and only after a hearing subject to judicial review - a procedural protection enjoyed by no other executive branch employees. 5 U.S.C. §§7513, 7521. Just as our independent judiciary is structurally insulated from influence by other governmental branches, so Congress intended ALJs to be an independent bulwark for administrative litigants against erroneous denials of benefits. While decisions of ALJs in the Social Security Administration are subject to review by the Appeals Council of SSA, they are charged with the important task of ensuring the development of a hearing record that is complete, objective, accurate, and fair.

In 1981, SSA initiated massive investigations of the continued eligibility for disability benefits of hundreds of thousands of beneficiaries on the agency's rolls. Of those individuals whose eligibility was reviewed, the benefits of nearly 47% were terminated. This resulted in a huge increase in the number of administrative appeals. ALJs reinstated benefits in 67% of the cases they considered in 1982.

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*Bernard G. Segal, The Administrative Law Judge: Thirty Years of Progress and the Road Ahead, 62 Amer. Bar Assn. J. 1425 (1976).

The large number of reversals of initial decisions to terminate benefits occurred because many of these continuing disability investigations were hastily completed; because the initial disability determinations were made on the basis of SSA policies which had never been officially promulgated and thus were not binding on ALJs; and because ALJs were generally the first decisionmakers to actually observe and listen to the claimants themselves.

In addition, ALJs faced an increase in the number of appeals from mentally disabled beneficiaries. In 1978, SSA began to require termination of the benefits of mentally disabled beneficiaries based on a policy which prohibited initial decisions that found individuals under age 50 with certain types of mental impairments to be able to work, despite SSA regulations which require an individualized assessment of disability. This policy has been characterized as "covert", "sub rosa" and "clandestine". City of New York v. Heckler 578 F. Supp. 1109, 1115-1116 (E.D.N.Y. 1984); aff'd 742 F.2d 729 (1984) certiori granted October 8, 1985; No. 84-1923 sub.nom. Bowen v. City of New York. Cf. Mental Health Association of Minnesota v. Schweiker, 554 F. Supp. 157 (D. Minn. 1982) aff'd 720 F. 2d 965 (8th Cir. 1983).*

This unprecedented increase in the number of appeals created enormous pressures on the administrative review system of SSA. In its efforts to handle this onslaught, the Social Security Administration instituted a number of changes within its Offices of Hearings and Appeals aimed at increasing the efficiency of ALJs and arguably, decreasing the number of allowance decisions issued by ALJs.

Numerical goals for ALJ decisions were set in a manner which emphasized quantity over quality. Information about ALJ high reversal rates was circulated and emphasized in a critical vein. In 1982, charges were filed with the Merit Systems Protection Board against several ALJs for failing to meet production quotas. ALJs with high production records were praised without adequate regard to the quality or completeness of decisions.

Furthermore, in 1980, the following provision, introduced by then Senator Bellmon, was passed as part of the Social Security Disability Amendments Act of 1980:

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* ABA filed a brief of amicus curiae in Bowen v. City of New York which argued that exhaustion requirements and the 60-day statute of limitations can be waived for class members challenging the secretary's use of an illegal covert policy to deny benefits.

> "...The Secretary of Health and Human Services shall implement a program of reviewing, on his own motion, decisions rendered by administrative law judges as a result of hearings under section 221(d) of the Social Security Act, and shall report to Congress by July 1, 1982 on his progress. ..."

Although the legislative history of this particular amendment makes it clear that all decisions should be reviewed, in 1981, SSA created a review program which targeted the decisions of individual ALJs with high benefit allowance rates for scrutiny.

In October 1981, the Associate Commissioner of SSA for Hearings and Appeals issued a memorandum which announced that individual ALJs with reversal rates of 70% or higher were to have 100% of their decisions allowing benefits reviewed for accuracy. One hundred and six ALJs were placed on such review which applied to all high allowance judges regardless of their decisional soundness. The accuracy of benefit denial decisions was not reviewed. Additionally, the memo advised that if ALJ "performance" (that is high reversal rates) did not improve "other steps" would be initiated. ALJs feared that this might mean disciplinary action. These targeting practices were vigorously opposed by ALJs who viewed them as an attempt to exert undue pressure to uphold initial decisions denying benefits, and cut the disability rolls.

Further, during this period, ALJs were handicapped by SSA's policy of nonacquiesence in major federal circuit decisions allowing benefits (criticized by the ABA in Report 110, July 1985).* They faced the quandary of either adhering to SSA's nonacquiesence rulings (knowing their decisions would likely be overturned in the federal courts because they failed to adhere to circuit precedent) and letting their decisions be overturned in the Appeals Council of the Social Security Administration (which served as the Secretary's review mechanism for the correctness of ALJ decisions).

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* Numerous circuit and district courts have confronted and either expressly or implicitly rejected SSA's contention that it may refuse to follow a federal circuit court decision in subsequent cases within the circuit. *See e.g. Douglas v. Schweiker* 734 F 2d 399, 400 (8th Cir. 1984). (Secretary's assertion that claimant has burden of establishing inability to perform light work is wrong and the Secretary knows it is wrong...The Secretary has not appealed from our decision on this point...Thus, this view is the law of the Circuit...ALJs must recognize and apply this law in their decisions...); *Capitano v. Secretary of HHS*, 732 F.2d 1066, 1070 (2d Cir. 1984); *Layton v. Heckler*, 726 F.2d 440, 442 (8th Cir. 1984); *Lopez v. Heckler*, 725 F.2d 1489, 1497, 1503 (9th Cir. 1984). *Stieberger v. Heckler*, 615 F. Supp. 1315, 1400 (D.C.N.Y. 1985). (Preliminary injunction requiring SSA to comply with Second Circuit precedents granted.)

In Association of Administrative Law Judges v. Heckler, 594 F. Supp. 1132 (D.C.C. 1984), a lawsuit challenging SSA's manner of implementing the Bellmon review process called for by the 1980 Amendments, the Court concluded:

> "...the defendants' unremitting focus on allowance rates in the individual ALJ portion of the Bellmon Review Program created an untenable atmosphere of tension and unfairness which violated the spirit of the APA, if no specific provision thereof. Defendants'insensitivity to that degree of decisional independence the APA offers to administrative law judges and the injudicious use of phrases such as "targeting", "goals" and "behavior modification" could have tended to corrupt the ability of administrative law judges to exercise that independence in the vital cases they decide...Plaintiff has achieved considerable success in its valid attempt to reveal and change agency practices. ..." 594 F. Supp. 1132, 1143 (D.D.C. 1984).

An injunction was not issued because the Bellmon review process had been reformed by 1984. Association of Administrative Law Judges at p. 1141-43. Cf. Stieberger v. Heckler, 615 F. Supp. 1315, 1398 (D.C.N.Y. 1985) (In a case seeking, among other things, an order enjoining future implementation of previously used methods of Bellman Review, Court held that "Plaintiffs have made more than a colorable claim showing that the Secretary's Bellman Review program was in its initial stages a potentially prejudicial one in its effects in the impartiality of ALJs.")

The Social Security Administration has retreated from some of the most egregious policies threatening the independence of ALJs. Reviews targeted primarily at individual ALJs with high reversal rates are no longer conducted. (A random selection system has been substituted.) Also, the 1984 Social Security Disability Benefits Reform Act (Pub. Law 98-460) changed the manner in which continuing disability investigations can be conducted. Although ALJs in the Social Security Administration continue to be concerned about issues regarding the organization of hearing offices and adjudication directives, the situation has dramatically improved.

JUSTIFICATION FOR RESOLUTION COMMENDING SSA ALJ CORPS

Despite the pressure felt by many ALJs to increase the rate at which they affirmed SSA benefit denials, it is a matter of history that they largely maintained their traditional affirmance/reversal rates and, presumably, the objectivity of administrative adjudication within the SSA disability program. The ALJ corps, both individually and as a body, acted vigorously and professionally to maintain appropriate levels of adjudicative independence and to insure that they fulfilled the role accorded their high office by the Administrative Procedure Act.

It is a tribute to the profession and its fidelity to the rule of law that the Social Security ALJs, during a period of great systemic strain, continued to insure that the processes they used to hear cases and render decisions were not compromised by pressures to stress "quantity" or to respond to extra-judicial budgetary concerns of SSA in individual case adjudication (however legitimate these considerations might have been as matters of general agency policy).* This was in the best tradition of American judicial officers discharging sworn obligations in times of public clamor and governmental flux. The result in this case was a noteworthy contribution to the integrity of the administrative process, protection of thousands of vulnerable elderly and disabled Social Security claimants from harm and injustice, and a sparkling demonstration of the viability and genius of the Administrative Procedure Act in whose enactment forty years ago our Association played such a central role. These are contributions which should not go unrecognized, especially since they involved not just one or a few individuals honoring their professional obligations but a massive corps of members of the bar "holding the line" during difficult times.

It should be stressed that the proposed recognition is in no way intended to criticize any government agency, policy, or the hard working officials who implement such policy. The focus rather, is on fidelity to duty and profession by a body of federal adjudicators at a time and under circumstances when both citizen welfare and the rule of law needed -- and received -- an extra measure of devotion to those principles. Any citation authorized by the ABA should embody this focus and the Commission on Legal Problems of the Elderly would deplore allowing any contrary impressions to be conveyed.

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*Indeed, the Commission notes with gratification that the SSA ALJs did respond to the agency's desire to maximize adjudicative efficiency, increasing average case dispositions per ALJ from 30 cases per month in 1980 to 37 cases per month in 1984 (a more than 20% increase in productivity).

American Bar Association

1985/86

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March 21, 1986

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Charles M. Thompson, Chairman
American Bar Association
Board of Governors
Operations Committee
750 North Lake Shore Drive
Chicago, Illinois 60611

Re: Special Recognition for Social Security Administration Corps of Administrative Law Judges

Dear Mr. Thompson:

The Administrative Law Section is pleased to join in the request of John H. Pickering, Chairman, Commission on Legal Problems of the Elderly, for a one-time special recognition of the Administrative Law Judge Corps of the Social Security Administration, as more particularly set forth in his March 6, 1986, memorandum to you.

Sincerely,

William E. Murane

William E. Murane
Chairman

WEM:je
cc: John H. Pickering, Esq.

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STATEMENT BY

SENATOR DAVID PRYOR

Subcommittee on Administrative Practice and Procedure

Committee on the Judiciary

May 13, 1986

Mr. Chairman, I am pleased to have this opportunity to testify before this Subcommittee on issues related to the administrative independence of administrative law judges. I first became interested in this issue in the early 1980's when we began experiencing a crisis with respect to Social Security disability terminations. It became clear over time that not only did the Congress need to reform the disability review process, but that the treatment of administrative law judges under the Social Security Administration required an intense examination, as well. The Social Security Administration was setting productivity goals and allowance rates for ALJs, and was reviewing the judgements of ALJs whose allowance rates were considered too high. If these actions did not produce the desired results, selected ALJs would be called to Washington for "retraining", and they were harassed with phone calls and letters regarding their allowance rates. In short, the administrative independence of Social Security ALJs was severely threatened, and the intent of the Administrative Procedures Act was being thwarted flagrantly.

In an effort to ease these undue pressures on ALJs, I introduced legislation (S. 580) to create an independent HHS Review Commission to replace the HHS Office of Hearings and Appeals. This legislation would go a long-way toward establishing independence for administrative law judges within HHS, which comprise about 80 percent or so of the total ALJs in the United States.

Since introduction of my bill, it has come to my attention that there are other problems within the ALJ system which may require corrective action. Senator Heflin, I believe your legislation to create a unified ALJ corps would better address the more comprehensive problems of the whole ALJ system. I firmly believe that it is of great importance that the Congress act to eliminate the problems in the system, and offer whatever assistance I can provide to your committee.

DEPARTMENT OF HEALTH & HUMAN SERVICES

Social Security Administration

Refer to SGJ1

Memorandum

Date: JUL 29 1986

From: Associate Commissioner
Office of Hearings and Appeals

Subject: Workload Priorities: The Quality/Quantity Equation

To: Regional Chief Administrative Law Judges
Regional Management Officers
Hearing Office Chief Administrative Law Judges
Administrative Law Judges
Hearing Office Managers and Supervisors
Hearing Office Hearing Analysts, Staff Attorneys, and Support Staff

In December 1985, after soliciting and receiving field input, I established a number of workload performance objectives for fiscal year 1986. In pursuit of those goals, our major efforts at the hearing level this year have been directed to improving case processing times, reducing the age of pending, and increasing the quality of our work. While much remains to be done, June statistics indicate considerable progress in these areas: our average processing time at the hearing level was down to 175 days, a decline for the third consecutive month; the average age of pending stood at 112 days, reflecting a decrease for the fifth consecutive month and a decline of 21 days from the January figure; and there was a reduction in 365-day and 270-day cases for the first time in many months. At the end of June, aged cases, at 2,182, accounted for only 2.2% of our pending workload, and old cases, at 6,436, represented only 6.5%. At present, three regions are meeting or exceeding the national processing time goals, five regions are meeting or exceeding the average age of pending goals, and five are meeting or exceeding both the aged and old case pending goals.

We have made significant improvements in the quality area as well. We have now completed Disability Benefits Reform Act training for administrative law judges, staff attorneys, hearing analysts, and hearing assistants, have provided orientation to a third of our contract medical advisors, and have begun to develop our continuing legal education program for fiscal year 1987. We have continued the supplemental review process, eliminated "harmless error," procured four-track hearing recording equipment, and taken other steps to improve the quality and defensibility of our decisions. Finally, we have made efforts to strengthen our program staffs in the field through regular calls, national conferences, and other initiatives. Overall, I am pleased with our progress and would like to express my congratulations to all of you--regional staffs, administrative law judges, hearing office management staffs, staff attorneys, hearing analysts, and hearing office support staffs--for your part in these achievements.

To a large extent, we have been able to make such significant progress because of the prevailing trend of fewer requests for hearing and low pending levels in the early months of fiscal year 1986; until recently, we had been able to focus on these areas without upsetting the delicate balance between quality and quantity. However, hearing receipts during the last five months have substantially exceeded dispositions, resulting in a gradual but significant increase in our pending workload. If allowed to continue, this unfortunate trend threatens to destroy the balance which we have worked so hard to achieve.

Moreover, the trend in increased numbers of requests for hearing is unlikely to be reversed in the foreseeable future. In addition to increased initial receipts, which have been growing at an average rate of nearly 1,200 per month since January, we can expect to begin feeling the effects of the Continuing Disability Review (CDR) resumption early in fiscal year 1987. To position ourselves to handle these increases, during August and September we must use every possible means to improve our disposition rate and regain control of the pending workload.

Since February, requests for hearing have outstripped dispositions by an average of 2,100 cases a month, causing the pending to increase by almost 11,000 cases. Of greater concern, the size of the disparity has grown every single month, culminating in June with an increase of 5,000 in the pending. If this trend continues, we will be facing a pending workload in excess of 105,000 by the beginning of the new fiscal year, an alarming possibility when we consider our very limited resources.

Over the last several weeks, we have been working to identify the causes of our inability to keep pace with receipts. Several areas have been isolated and are in need of attention. Though many of you have already taken steps to address these problems, even greater effort and cooperation will be required if we are to continue to provide the level of service the public expects and deserves.

One of our main problems is getting decisions drafted. In the first few months of the fiscal year, only one or two regions had any real difficulty in decision preparation. Through the assistance of some of the other regions, we were able to keep these backlogs under control. Since March, however, the number of cases awaiting decision drafting per staff attorney/hearing analyst has risen by 39%, from 8.26 to 11.49. During the month of June, fully half of the regions reported decision drafting backlogs and requested out-of-region assistance. This substantial increase in the number of cases awaiting decision drafting made it impossible for us to arrange assistance for all of those needing help.

Our discussions with regional office staffs have produced several suggestions on how we may be able to manage our decision drafting workload more effectively. First, before requesting outside assistance, hearing office management staff should consider steps which could be taken within the office, such as (1) using overtime to increase the capacity of productive employees; (2) detailing hearing assistants, on a temporary basis, to write decisions (particularly in offices which are unable to fully utilize their HAs in their usual roles); (3) having hearing assistants who monitor hearings draft the hearing testimony portion of the decision; and (4) ensuring the judicious use of "other" time by decision writing staff. In this regard, the HO Chief ALJ and Supervisory Staff Attorney must keep in mind their responsibility to carefully weigh requests for "other" time in light of the office's decision writing workload, and to approve such time only when genuinely warranted.

Further, while judges should continue to concentrate on hearing and deciding cases, it would be helpful if they could also draft some of their own decisions (e.g., allowances) or, where practical, assist the writers by summarizing the testimony at the hearing. If none of these options is available in an office, or if they prove inadequate to the task, the HO should advise the Regional Office, who will attempt to arrange for help within the region. Failing that, the RO will contact Central Office, and we will arrange for out-of-region assistance to the extent possible. I urge all of you to work as hard as you possibly can to get your decision drafting workload under control and to cooperate fully when it comes to assisting other offices and regions.

Other case processing stages identified as troublesome by field staffs are the work-up and scheduling of cases for hearing and the holding of hearings. During May and June, the number of hearings scheduled nationally was 97% of receipts, with six of the ten regions scheduling from 3% to 17% fewer cases than received. This represents a decline in performance from prior months, when as a rule we scheduled slightly more cases than received. Moreover, during May and June, the proportion of cases heard to scheduled was only 79% nationally, and only four regions had an 80% or better rate of hearings held to scheduled. While this is a slight improvement over FY 1985 performance, it is a disappointing statistic and one which we must improve. It is critical that we use aggressive measures to increase the number of cases scheduled each month and reduce the number of postponements and continuances.

The key to improving productivity is better utilization of our existing staff resources. Despite the large number of cases transferred for hearing, case preparation, decision drafting and decision typing, there are still many offices with either too much or not enough work. In order to maximize productivity, provide timely service to the public, and continue issuing high quality decisions, we need to correct those imbalances to the extent possible. Simply working harder will help, but it is not enough. What we must do is manage our resources more efficiently by utilizing staff in other than their traditional roles; by extending available work hours through judicious use of overtime and "other" time; and by shifting staff and work within offices, between offices, and between regions. Again, I urge those of you able to provide assistance to volunteer your services to those in need. Meeting this workload challenge will require a high level of cooperation and teamwork.

I am asking the Regional Offices to arrange conference calls with hearing office management staffs to discuss these matters as soon as possible; as appropriate, HO management staffs should, in turn, meet with administrative law judges, staff attorneys, hearing analysts, and support staff to identify problem areas in their individual offices and to develop plans for improving productivity. It is important that everyone clearly understand the urgency of the situation and the need to act immediately.

In closing, I want to thank all of you for your efforts during the year and urge a very strong fiscal year finish. Service to the public is measured by quality and quantity--we now have all the mechanisms in place to achieve the highest quality; during the next two months, we must maintain that high standard while working to restore the quantity side of the equation. I ask each of you to do everything you can to attain that end. Let us know what the Central Office can do to assist you.

Frank V. Smith
Frank V. Smith III

cc: Central Office Executive Staff

ABA JOURNAL
'76?

by Bernard G. Segal

ON JUNE 11 of this year the American institution of administrative law celebrated a significant birthday. On that day thirty years ago President Truman signed into law the Administrative Procedure Act of 1946, literally our administrative "bill of rights." As this historic legislation enters its fourth decade, it is appropriate to reflect on the officials who make our administrative law system work—the administrative law judges.

A significant step forward was taken four years ago when the title "hearing examiner" was changed to "administrative law judge." Obviously, calling one a judge does not make a judge, but at least the change in title recognized and gave emphasis to the fact that the function of the hearing examiner is not merely to hear or examine; it is also to judge. Substantial progress has been made since the title change, but a great deal more needs to be done to make the office truly synonymous with the name it bears.

Despite the critical role that administrative law judges now occupy in our justice system, and despite their enormous increase in numbers—from 197 for eighteen departments and agencies in 1947 to 835 for twenty-eight in 1976—they still constitute what has been aptly called America's "hidden judiciary."[1] We are, however, at a moment of transition in this respect, for our country is experiencing a "right to know" explosion of epic proportions, and the agencies sit at the very center of that explosion. Consider, for example, what the recent amendments to the Freedom of Information Act have done to the internal operation of government agencies. Then, too, there are the numerous new acts of Congress, most of them peppered with requirements that agency decisions be made only after hearings that are often extended and complicated.

Administrative Law Judge as a True "Jurist"

As a result, the next few years will present the administrative law judges with the opportunity to establish themselves as a true "jurists," commanding increasing attention and respect both from the agencies whose cases are adjudicated and from the litigants and witnesses who appear in those cases. On the other hand, the emergence of the administrative law judge as a public figure will inevitably place heavier responsibilities on both the judge and the system.

How then do we accelerate the process of attracting the most qualified people to the administrative bench, and how do we improve the system under which they operate? I urge that we begin by completely divorcing administrative law judges from their agencies by the establishment of a unified corps of administrative law judges, centrally located and not regularly assigned to any particular agency. This would not only increase the attractiveness of the office; it would also solidify the mandate that administrative law judges be completely independent and impartial triers of fact.

The most persistent argument against unification is that an administrative law judge must be expert in the substantive law of the agency. I am no more persuaded by this thesis than I am that we need to have specialized judges in our federal court system. I realize that administrative law judges function in very specialized areas of the law, but so do federal district judges, and yet they have demonstrated no ineptitude in making findings and reaching conclusions in the most technical disciplines. Like the district judge in a nonjury trial, administrative law judges are largely finders of facts. They are not "special masters," advisers, or counselors. Their function is to judge, after hearing counsel and the testimony and doing the necessary analyzing, weighing, and studying, case by case, issue by issue. To the extent that impartial technical advice or instruction might be desirable, this could be provided by a cadre of experts to be available to administrative law judges generally.

Should Judges Specialize?

Proponents of the present system cite the fact that specialization has become a way of life among lawyers, and they query, why not among judges? Perhaps one answer is that administrative law judges need not specialize, precisely because the lawyer before them so often does and also because expert witnesses—specialists—may be expected to testify. Our system of adjudicating controversies presumes that the advocate will present his case to an impartial fact finder. It is the advocate who should be the expert on the facts in the courtroom. Parenthetically, I caution that this does not mean that a trial lawyer must be a specialist in the field involved. A competent trial lawyer, like a competent trial judge, can function effectively in virtually any kind of case.

I recognize the problems that would attend the change I am advocating, but logistical obstacles should not stand in the way of needed reform. The problems that must be solved pale when compared with the benefits to be derived.

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[1] The twenty-eight departments and agencies currently employing administrative law judges are Atomic Energy Commission; Civil Aeronautics Board; Commodity Futures Trading Commission; Consumer Product Safety Commission;Department of Agriculture; Department of Housing and Urban Development; Department of Labor; Environmental Protection Agency; Federal Communications Commission; Federal Maritime Commission; Federal Power Commission; Federal Trade Commission; Food and Drug Administration; Internal Revenue Service, Department of the Treasury; International Trade Commission; Interstate Commerce Commission; Maritime Administration, Department of Commerce; National Labor Relations Board; National Transportation Safety Board, Department of Transportation; Occupational Safety and Health Review Commission; Office of the Secretary, Department of the Interior; Office of the Secretary, Department of the Interior (Indian Probate); Postal Rate Commission; Securities and Exchange Commission; Social Security Administration, Department of Health, Education, and Welfare; United States Civil Service Commission; United States Coast Guard, Department of Transportation; and United States Postal Service.

In addition to the 835 permanently assigned administrative law judges, 190 temporary A.L.J.'s have been assigned to the Social Security Administration's supplemental security income program, with authority in the Social Security Administration to retain them until December, 1978.

Consider, for example, the unavoidable appearance of bias when an administrative law judge, attached to an agency, is presiding in litigation by that agency against a private party. One can fill the pages of the United States Code with legislation intended to guarantee the independence of the administrative law judge; but so long as that judge has offices in the same building as the agency staff, so long as the seal of the agency adorns the bench on which that judge sits, so long as that judge's assignment to the case is by the very agency whose actions or contentions that judge is being called on to review, it is extremely difficult, if not impossible, for that judge to convey the image of being an impartial fact finder.

The permanent assignment of an administrative law judge to a single agency also tends to produce an inbreeding, which in turn contributes even more to the appearance of bias. For example, of the thirteen administrative law judges assigned to the Federal Trade Commission, twelve are former employees of that commission; and of the seven new administrative law judges whose appointment was announced in May by the National Labor Relations Board, every one was either a current or a former member of the board's legal staff.

The System Cries Out for Change

Recently an attorney was startled to find that counsel for a government agency the attorney's private client had opposed in a case before a commission was now going to preside, as the newly appointed chief administrative law judge, for the very same commission in a case involving the administrative law judge's former "client," the government agency, and virtually the same private party opponents. (The commission did ask whether anyone objected to the administrative law judge's presiding in the case. No one responded with an objection.) This is a multiparty litigation. Necessarily some parties will lose in the proceeding. Will anyone ever convince the private parties who may not prevail in the proceeding that their cause received fair and impartial consideration? In asking this question, I am not criticizing either the agency or the administrative law judge; it is the system that cries out for change.

A partner in our firm resigned in 1969 to become a judge of a United States court of appeals. Even after a seven-year absence from private practice, this judge still will not sit in any case in which his former law firm or any lawyer now with that firm appears as counsel, and I am certain that he never will sit in a case involving a party whom his former law firm, or any member of it, represented while he was a member of the firm. By contrast, agency attorneys who become administrative law judges, can sit as judges in an endless chain of cases in which their former employer, and in many instances client as well, is a party. How can such a system maintain the appearance of fairness?

Another major factor, both in attracting and keeping highly qualified lawyers on the administrative bench, is the salary of the office. I remember how surprised I was as chairman of the Commission on Judicial and Congressional Salaries, created by the Eighty-third Congress, to learn, as we began our work in 1953, that in 1947, one year after the Administrative Procedure Act had been adopted, hearing examiners were assigned salaries ranging from $5,232 to $10,330. At that time the salary of federal district judges was $15,000, almost three times hearing examiners' minimum and almost one and one half times their maximum. These unrealistic differentials have been narrowed in subsequent years but obviously not sufficiently.

The Salary Act of 1967, which provides for the quadrennial appointment of a Commission on Executive, Legislative, and Judicial Salaries to make recommendations concerning the compensation of members of Congress, federal judges, and government personnel covered by the executive schedule, indirectly but materially affects the salaries of many administrative law judges. Under the act, the commission reports its recommendations to the president, and to the extent that they are incorporated by the president in his budget message to Congress, they become law unless rejected by either the Senate or the House. Since the compensation of administrative law judges is covered by the general schedule, for them a critical provision of the 1967 act, as amended, is that the salary of anyone whose compensation is determined by the general schedule may never rise above the salary provided for executive level V.

The draftsmen of the 1967 act were very careful to provide for the filing of commission reports at times that would avoid recommendations based thereon being submitted to the Congress by the president in an election year. However, President Nixon changed this in 1973. In order to prevent any salary increases that year for the three classes of officials within the commission's jurisdiction, and in clear violation of the act, Mr. Nixon advertently postponed making his three appointments to the commission until it was too late for the commission to report in time for the president's 1973 budget message to the Congress.[2]

Accordingly, President Nixon's 1973 budget message contained no recommendation with respect to the salaries of these three groups of government officials. By then, G.S.-17 administrative law judges were prevented from receiving the full salary to which they would have been entitled under the step 3 increase, since that would have brought them above the $36,000 executive level V rate. Even the G.S.-16 administrative law judge topped out at step 8.

The 1973 commission reported to the president on June 27, 1973, when wage and price controls were in

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[2] See 2 U.S.C. § 352. Appointments to the commission are made, three by the president of the United States, one of whom shall be designated as chairman by the president; two by the president of the Senate; two by the Speaker of the House of Representatives; and two by the chief justice of the United States.

A Philadelphia lawyer, Bernard G. Segal was president of the American Bar Association in 1969–70. He is now a member of the federal Commission on Executive, Legislative, and Judicial Salaries.

Fabian Bachrach

effect. Four commissioners recommended a 25 per cent increase in salaries. I wrote a concurrence and dissent, joined in by two other commissioners, calling for a 30 per cent increase. Two members—both lawyers—voted that no increase should be recommended.

In his budget message in 1974 (an election year), purportedly on the basis of the commission report, President Nixon concocted a formula I can only describe as weird, coming as it did at a time when a mere catch-up in the cost of living increase since March, 1969, the date judicial salaries had been last raised, would have produced a salary increase of 29.4 per cent. Disregarding this entirely, he recommended increases of 7.5 per cent a year in each of 1974, 1975, and 1976, which proved not even enough to cover the cost of living increases for those three years. But 1974 being an election year, the Senate rejected even this paltry recommendation. Therefore, by the end of 1974, "compression" had effectively wiped out any increase for the G.S.-17 grade, and even the G.S.-16 judge could scarcely progress beyond the starting salary, which by then had become $34,607.

On August 9, 1975, President Ford signed into law an amendment to the Federal Employees Salary Act of 1970, extending coverage of the act to the officials subject to the jurisdiction of the Commission on Executive, Legislative, and Judicial Salaries.[3] As a result, the 5 per cent increase for 1975 voted for all government personnel in October, 1975, brought the federal district judge's salary to $42,000 and the level V executive (and therefore the administrative law judge maximum) to $37,800. At last, the logjam was broken, but the position of administrative law judge can still rise no higher than the $37,800 a year set for the level V executive.

Appointments have now been made to the next quadrennial commission, whose report should be filed before the end of this year in order that the president may incorporate such of its findings as he may consider appropriate into his 1977 budget message to Congress. Salient facts confronting the commission are: (1) although since March, 1969, the cost of living has increased by 58.4 per cent, judicial salaries have increased by only 5 per cent; and (2) were district judges merely to receive salaries equaling this disparity, they would now be getting $63,400 rather than $42,000 as at present. Obviously, this salary would be considerably higher than $63,400 if annual cost of living increases had begun in 1969 and continued up to now. On the same basis, salaries of executive level V personnel would be $57,024, substantially above the highest to which G.S.-16 officials, including administrative law judges, would be entitled absent compression—$47,237. The same would apply, although the differential, of course, would be smaller, to G.S.-17 officials including relatively few administrative law judges.

Under these circumstances, it is critical that organizations representing the administrative law judges now address themselves to a more equitable and more effective procedure for determining the salaries of these officials. One suggestion is that the administrative law judge's salary be a fixed percentage of the salary of district judges. Two presidents have recommended a salary for executive level V officials 10 per cent under that of district judges. An alternative would be to have administrative law judges moved from the general schedule to the executive schedule, thus extending the jurisdiction of the Commission on Executive, Legislative, and Judicial Salaries to include administrative law judges. In my view, the latter of these possibilities would produce the best results for administrative law judges in the years ahead.

I urge that the subject be given prompt and thorough study, and that this be followed by ceaseless and vigorous activity. The Federal Administrative Law Judges Conference and the Conference of Administrative Law Judges of the American Bar Association Division of Judicial Administration are amply endowed for this purpose. I am confident that the American Bar Association through its House of Delegates or its Board of Governers would enthusiastically support any effort to provide a procedure that would give reasonable assurance of adequate compensation for administrative law judges.

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[3] The first salary increases to federal employees covered by this provision went into effect on the first pay period after October 1, 1975, pursuant to Executive Order 11883, October 6, 1975.

As this article goes to press, Congress has taken action of a most disappointing and wholly unpredictable character. The House of Representatives had amended a rider to the Legislative Branch Appropriations Bill for fiscal year 1977 to provide that no part of the funds appropriated in that act or any other act shall be used to pay the salary of any individual covered by the Federal Salary Act of 1967, as amended, at a rate which exceeds the salary rate in effect on September 30, 1976, for such position or office, except increases submitted pursuant to Section 225 of the Federal Salary Act of 1967, as amended, by the president on the basis of the report of the Commission on Executive, Legislative, and Judicial Salaries. The Senate restricted this provision to members of the Congress. However, the conference committee adopted the House version. Accordingly, none of the three groups of government officials can receive any salary increase in 1976. In signing the bill on October 1, 1976, President Ford said in part:

"I am signing H.R. 14238, Appropriations for the Legislative Branch for Fiscal Year 1977, with reluctance. . . . While last year's law did not solve these problems by any means, it did give some small relief to federal officials who had not had a pay raise since 1968, despite large increases in the cost of living. In the bill I am signing today, Congress has not only withdrawn the small step they took last year to help alleviate the problems of federal pay, but they have created additional chaos. If the Congress had frozen *only* the pay of its members in this bill, I would sign without hesitation. Instead, in this election year, the Congress chose not only to stop its own pay raises but those of the judiciary and top-level executive branch employees as well. Further, the Congress has created havoc in the pay levels throughout the federal government. . . . The Congress has made a bad situation worse. I seriously considered returning this bill to the Congress without my approval. However, I am signing this bill because the Congress will have an opportunity to remedy the situation early next year when I present my recommendations after reviewing the proposals of the quadrennial Commission on Executive, Legislative, and Judiciary Salaries."

Another way in which the position of administrative law judge could be made more attractive to both applicant and incumbent would be the adoption of uniform rules of practice to apply in all cases, regardless of the agency involved, just as was done years ago for the United States district courts and much more recently for the United States courts of appeals. The new rules for administrative proceedings should delegate more authority to administrative law judges; there should be fewer *de novo* hearings by the agencies; grants of review of administrative law judges' decisions should be closer to a certiorari process than to review on a mandatory basis; and discovery procedures should be made uniform for all agencies, both in detail and in scope.

Educational Opportunities Have Expanded

Then, of course, there is the subject of continuing judicial education. Not many years ago there was little education of that kind available for administrative law judges, except for the two-day seminars conducted under the auspices of the Federal Administrative Law Judges Conference in co-operation with the George Washington University Law School. About four years ago the National College of the State Judiciary in Reno, Nevada, an American Bar Association creation, began offering a concentrated program for administrative law judges twice a year. And in 1973 the American Bar Association launched the Center for Administrative Justice, which is conducted as an activity of the Section of Administrative Law. But far too many administrative law judges attend too few or, indeed, no courses.

Vastly more needs to be done in this area. Just as federal judges have the enormous advantages of the advanced judicial education programs and other activities of the Federal Judicial Center, the administrative law judges should have the advantage of a Federal Administrative Justice Center in Washington with many of the same purposes as the Federal Judicial Center.

I have touched on some ways in which our administrative system can come to the aid of the administrative law judge. But what of the ways in which administrative law judges can come to the aid of the system? Trial judges can do a great deal to improve the image of justice; unfortunately, they can tarnish it too.

We assume, of course, that administrative law judges bring to their office sterling character and unimpeachable integrity. But what of judicial temperament? An agency or an appellate court can readily correct an error of law, but it cannot undo the impact on the image of administrative justice caused by an intemperate or even an undignified administrative law judge. The litigant will never get around to observing the character or appraising the ability of the judge who flies into tantrums or intemperately abuses counsel or a party or a witness. A judge who frequently arrives late at hearings or otherwise unduly shortens the hearing day is demonstrating poor judicial temperament.

Another surface, but important, component of the qualified trial judge is dignified but firm control of the hearing room. Obviously, I do not suggest that a judge be arbitrary or dictatorial. On the other hand, the judge who admits evidence again and again "for what it is worth" in order to avoid or postpone making difficult or perhaps unpopular rulings, or who permits attorneys to berate witnesses or make inflammatory remarks, can quickly lose control of his hearing room. Certainly, these judges cannot hope to gain the esteem of those in the hearing room either for themselves or for the justice system they represent.

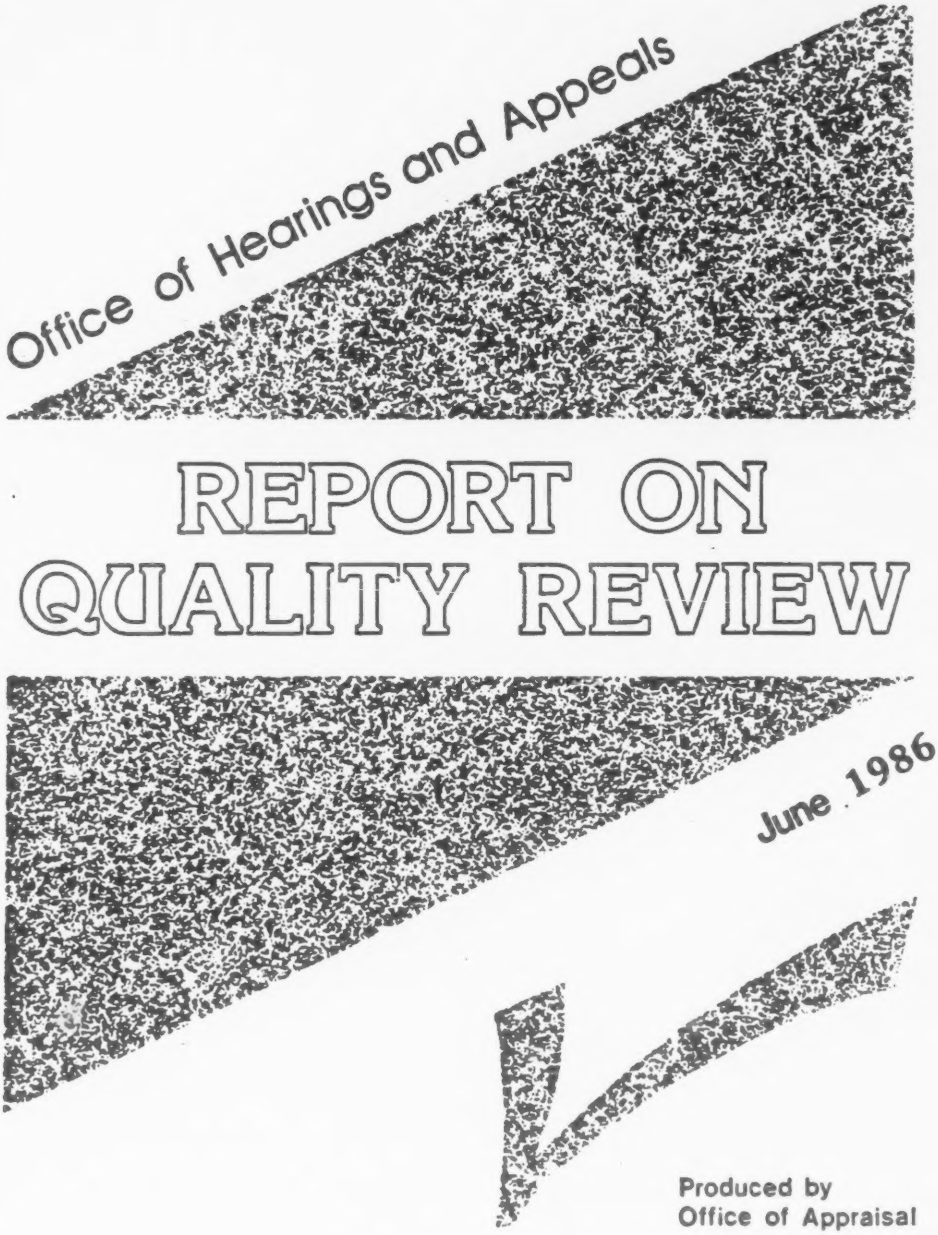
Then there is the matter of preparation. An unprepared trial judge is quickly discovered. The administrative law judge should never come to a trial without having read all the briefs that have been submitted and having studied every significant item filed in the case.

A judge who treats all who come into his courtroom with courtesy, understanding, and strict impartiality, who devotes his concentrated attention to the proceeding before him, and who acts with decorum and an even temperament engenders respect for himself and for the institution of justice he represents.

Only as Strong as the Weakest Link

I am convinced that many more administrative law judges meet high standards of ability, character, temperament, education, and training than otherwise, but it is an inexorable fact that the office of administrative law judge will be appraised on the basis not of its strongest members, but rather of its weakest members. It is the obligation of everyone connected with the system to prevent appointment of arbitrary or otherwise unqualified administrative law judges; to endeavor to persuade administrative law judges conducting their offices poorly that they can do better; and eventually to establish for administrative law judges an effective system, such as now exists covering judges in approximately two thirds of the states, for the removal, discipline, or compulsory retirement of administrative law judges who by reason of health, age, temperament, or otherwise are unfit to perform their duties.

I am confident that our administrative justice system will prosper. I am confident, too, that many of the reforms urged by the Administrative Conference, the American Bar Association, the Federal Bar Association, and the Federal Administrative Law Judges Conference will ultimately produce satisfying results. A truly competent and impartial administrative judiciary is a precious prize indeed. But even more than a precious prize, such an administrative judiciary is essential if our administrative justice system is to function successfully under the crushing weight of new legislation and new cases and in the fishbowl environment in which all of government finds itself as we embark upon our third century as a nation. ▲



Office of Hearings and Appeals

REPORT ON QUALITY REVIEW

June 1986

Produced by
Office of Appraisal

REPORT ON QUALITY REVIEW

PREFACE

Section 304(g) of Public Law 96-265, (the "Bellmon Amendment"), enacted June 9, 1980, directs that: "The Secretary of Health and Human Services shall implement a program of reviewing, on his own motion, decisions rendered by administrative law judges as a result of hearings under section 221(d) of the Social Security Act ...," (i.e., hearings on disability and blindness determinations under title II and/or title XVI of the Act).

Own motion pre-effectuation review, at this time, includes a national random sample of disability allowance decisions which are selected for review by the Office of Disability Operations (ODO) mailroom personnel according to the terminal digits of the social security number at the time the cases are received from the hearing offices (HOs). ODO immediately forwards the identified title II cases to OHA's Office of Appraisal (OA) where controls are established. The claim folders are then referred for decisional review by hearings and appeals (H&A) analysts in the Office of Appeals Operations (OAO). In addition, a national random sample of title II disability issue unappealed affirmation decisions, also identified on the basis of the terminal digits of the social security number, are selected by Docket and Files personnel in OHA Central Office as the claim files are received. These cases are also sent to OA for case control then referred to the H&A analysts for review. Both types of decisions are subjected to comprehensive evaluation to determine whether the conclusions reached by the Administrative Law Judge (ALJ) conform to the Social Security Act and Regulations. When it appears that a decision may not meet the appropriate criteria, the case is referred to the Appeals Council (AC) for consideration under its own motion authority. A Quality Review (QR) form identifying the major types of deficiencies found in the decision accompanies the H&A analyst's own motion recommendation which is sent to the AC. Upon completion of Council action, further information is recorded on the QR form to reflect the AC decision. The QR form is then detached from other claims material and forwarded to OA where the data is entered into the automated QR system. The attached series of charts is derived in part from such data, and in part from data in the OHA case control system or records maintained in the OAO review components in those instances when the AC action is not fully completed on the QR form.

QR also includes information captured by H&A analysts during their review of cases in which claimants request that the AC review unfavorable (affirmation) disability issue hearing decisions. Because of resource limitations, current reporting for these appealed affirmation decisions is limited to a random sample of cases.

HIGHLIGHTS

For this reporting period the composite national accuracy rate was 91.6 percent. This was based on a cumulative sample size of 42,853 cases--32,812 appealed affirmations, 8,535 allowances, and 1,506 unappealed affirmations. Region IV remained on top with an overall accuracy rate of 93.3 percent followed by Region VII with 92.6 percent.

Appealed Affirmations

- The national accuracy rate for appealed affirmations was 91.9 percent, ranging from 93.7 percent (Region VII) to 87.8 percent (Region I).
- The most frequent reason for remand was to obtain existing evidence (38.0 percent). Vocational or medical testimony was necessary in 40.5 percent of the remanded cases.
- Nationally, 30.6 percent of the Appeals Council (AC) reversal decisions were based on the claimants having met Listing criteria. An additional 15.1 percent were reversed because claimants' impairment(s) equaled Listing criteria. In 21.9 percent of the reversals a Vocational Rule directed a finding of disability.
- New and material evidence, introduced at the AC level, was a factor in 16.5 percent of the remands and 25.1 percent of the reversals.

Allowances

- The national accuracy rate was 89.2 percent for allowances, ranging from 91.6 percent (Region IV) to 84.6 percent (Region VI).
- The most frequent reason for remand was to obtain a consultative examination (54.6 percent).
- The AC's most frequent own motion reversals were based on the claimants being found "not disabled" due to a Vocational Rule (31.9 percent). Ability to do past work led to 31.6 percent of the AC's own motion reversals.

Unappealed Affirmations

- The national accuracy rate was 97.8 percent for unappealed affirmations.

INTERPRETATION OF QR INFORMATION

Below we have briefly described the content of the QR monthly report. This report is divided into five sections: 1) overview of ALJ decisional quality; 2) appealed affirmations--reasons for AC remand; 3) appealed affirmations--reason for AC reversal; 4) allowances--reasons for AC remand; and 5) allowances--reason for AC reversal. Although each segment is designed to provide unique information relevant to a particular issue, the result is an overall depiction of ALJ decisional quality.

The source of QR data is the forms completed by the OAO analysts during their review of the claim files. When QR forms are received in OA, claim files often are no longer available in OHA; therefore, OA can neither complete nor correct the data. As a consequence, the problem of incomplete information may at times be reflected in this report. All data entered into the OA Datapoint computer for the fiscal year as of the reporting date is included.

1) Overview of ALJ Decisional Quality

This section is designed to provide an "at a glance" summary of ALJ accuracy rates for the three current review classifications--appealed affirmations, allowances, and unappealed affirmations.

To obtain the accuracy rate for each review category necessitates several operations: 1) OAO recommendations for own motion/grant review are subtracted from the total cases reviewed to obtain the number of incorrect ALJ decisions; 2) the number of AC denials of own motion/grant review are then subtracted from the number of incorrect ALJ decisions to obtain the actual number of incorrect decisions; 3) this figure is then subtracted from the total number of cases reviewed; and 4) the result is then divided by the number of cases reviewed to obtain the accuracy rate. A ".0" accuracy rate indicates that although one or more cases have been reviewed, final AC action is unknown.

The composite accuracy involves the same calculations as described above, modified to obtain an overall accuracy rate.

During these computations, one factor that is discounted is the involvement of new and material evidence. To the extent that it exists and played a role in the remand and reversal actions, both the composite accuracy rates and the appealed affirmation accuracy rates would be increased.

2) Appealed Affirmations--Reasons for AC Remand

This section is intended as a source of information regarding what actions the AC requires of the ALJ subsequent to a remand. It should be noted that the AC may require more than a single action; therefore, the numbers of reasons for remand may exceed the total number of cases reviewed.

The percent of remands represents the proportion of total appealed affirmations reviewed where OAO recommended remand (minus those where the AC rejected the grant review/remand recommendation).

The percent for each remand reason represents the proportion of remanded appealed affirmations where the AC required that the ALJ complete a particular action.

In addition, this section includes information concerning the proportion of cases where the AC remand action occurred at least partially as a result of new and material evidence. The percent of cases remanded with new and material evidence represents that portion of total remanded appealed affirmations that had such involvement. Similarly the proportion reported for each remand reason represents the proportion of the cases with new and material evidence remanded for the particular reason.

3) Appealed Affirmations--Reasons for Reversal

This section provides insight into the reason behind the AC decision to issue a decision favorable to the claimant. Although in most instances only a single reason is reported for an AC reversal, occasionally more than one reason will be shown.

The percent of reversals represents the portion of the total reviewed appealed affirmations that were reversed by the AC. The percent for each reversal reason presents the proportion of the reversals that were accounted for by that reason.

The impact of new and material evidence is also shown in this section. The percent of reversals with new and material evidence represents the proportion of reversals having such information.

4) Allowances--Reasons for Remand

This section includes information similar to section 3; however, the cases included are ALJ allowance decisions. As with appealed affirmations, multiple reasons may cause the total number of reasons for remand to exceed the number of remands.

As explained in the discussion about appealed affirmations, the percent of remands represents the portion of total allowances reviewed that were remanded by the AC. The percent for each reason refers to the portion of remands where this was the required action.

Information regarding new and material evidence was not included for this review category because of lack of applicability.

5) Allowances--Reason for Reversal

This part is identical to that described in section 4 above except that the information is confined to ALJ allowance decisions. Also, because the issue of new and material evidence is inappropriate, this data is not reflected.

OVERVIEW OF ALJ DECISIONAL QUALITY

This section is designed to provide an "at a glance" summary of ALJ accuracy rates for the three review categories--appealed affirmations, allowances, and unappealed affirmations.

1) Appealed affirmations--An approximate 50 percent random sample of title II disability issue QR forms received subsequent to OAO review excluding all cessation cases reviewed during FY 1985 plus 100 percent of forms completed by OAO analysts during the first seven months of FY 1986.

2) Allowances--An approximate 15 percent random sample of title II disability issue ALJ decisions issued during FY 1985 plus the first eight months of FY 1986.

3) Unappealed affirmations--An approximate two percent national random sample of title II only denial cases were included for this review category. The report includes all of FY 1985 plus the first eight months of FY 1986.

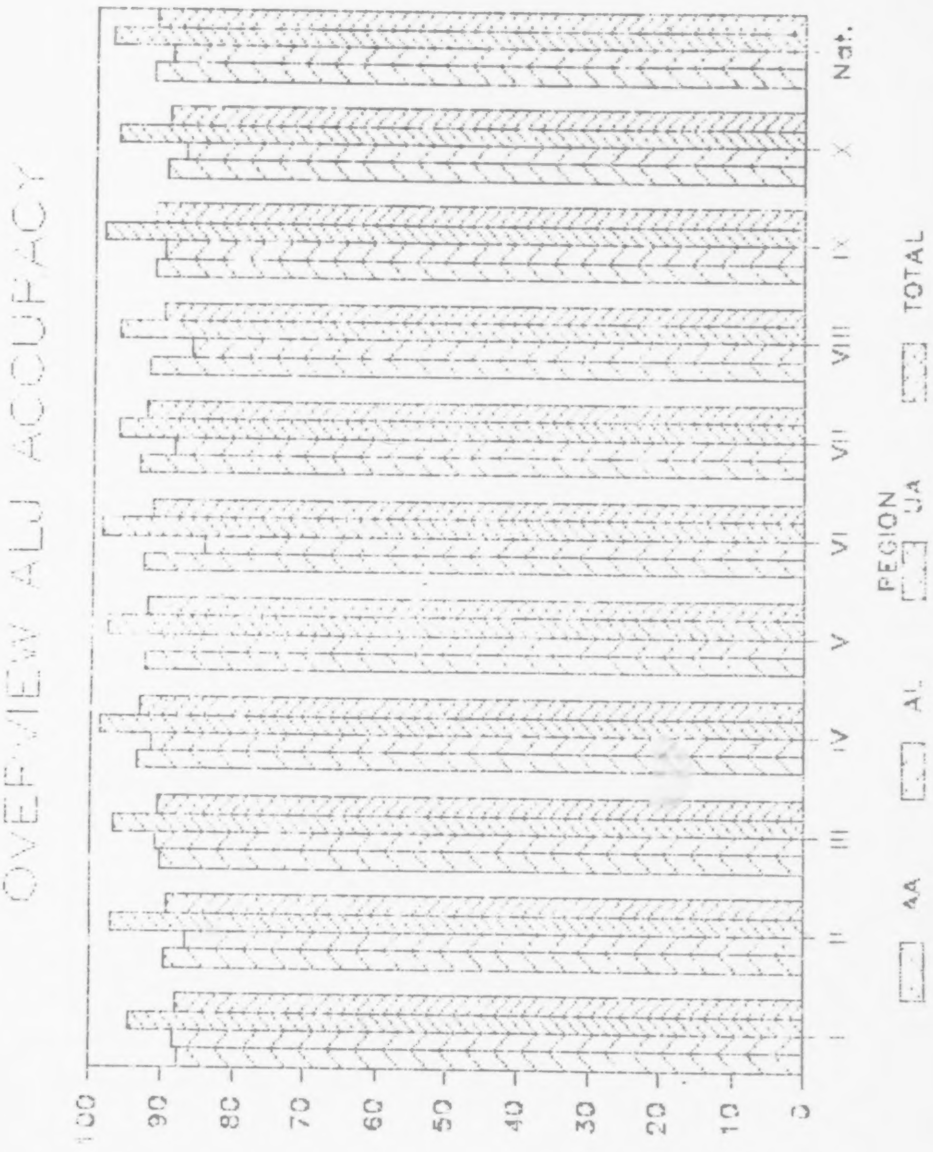
The accuracy rates are computed as follows:

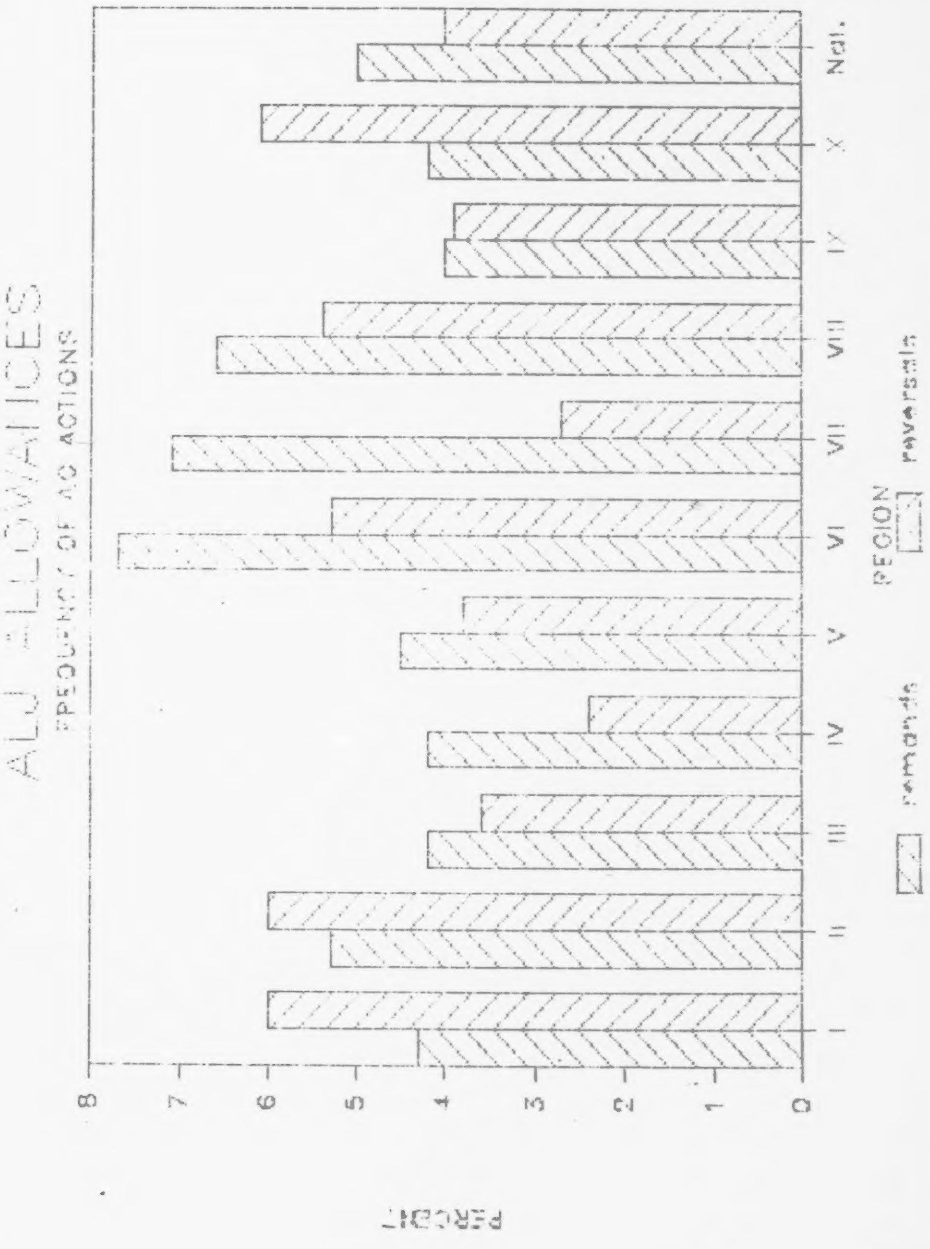
1) Number of GR/OM recommendations minus the number of AC denials equals the number of incorrect decisions.

2) Number of cases reviewed minus the number of incorrect decisions equals the number of correct decisions.

3) Number of correct decisions divided by the number of cases reviewed multiplied by 100 equals the accuracy rate.

The composite accuracy rate represents the proportion of the total number of cases reviewed for all categories that were correct.


OVERVIEW ALJ ACCURACY
100
90
80
70
60
50
40
30
20
10
0
I
II
III
IV
V
VI
VII
VIII
IX
X
Nat.
REGION
AA
AL
UA
TOTAL



ALJ ALLOWANCES

FREQUENCY OF AC ACTIONS

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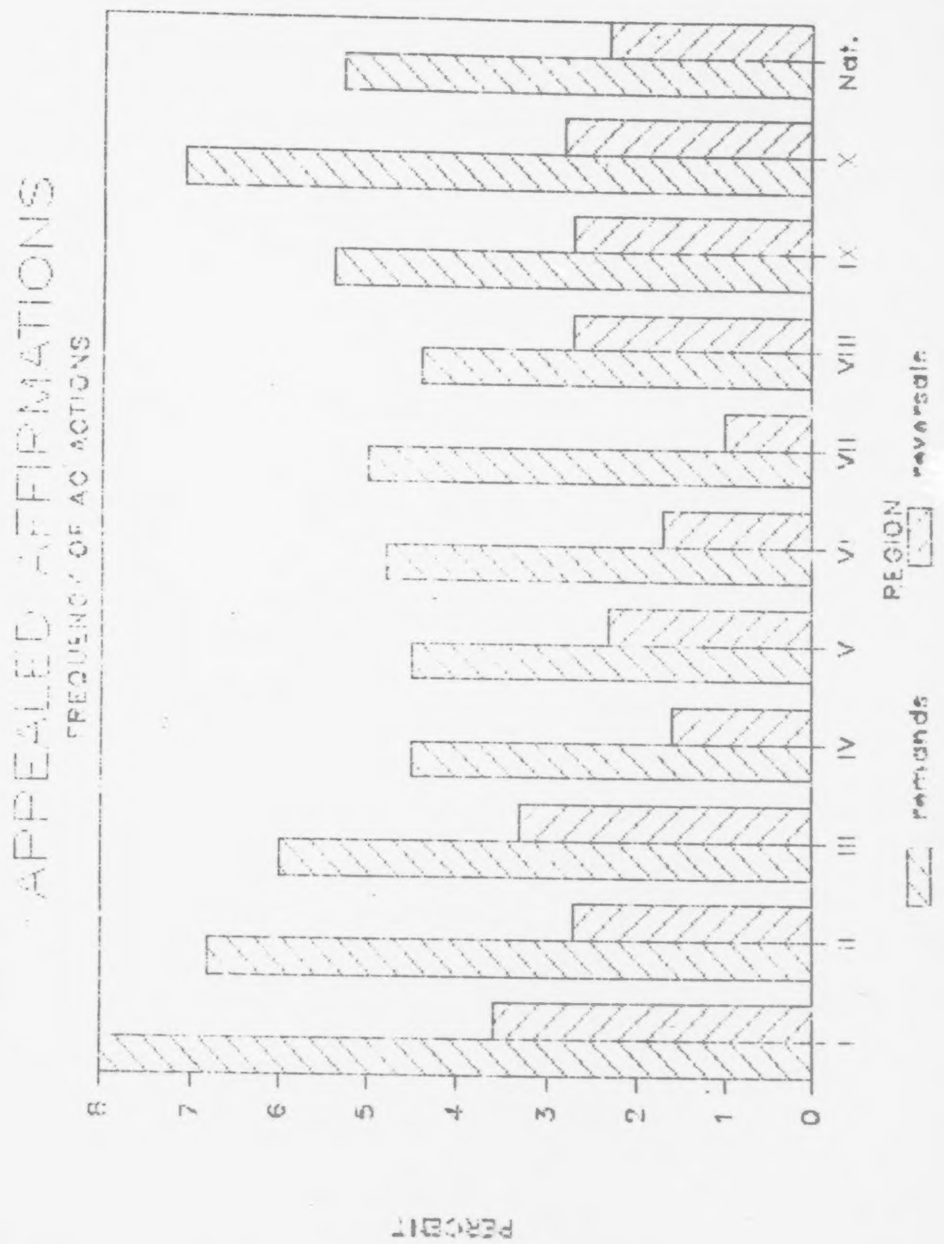

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OVERVIEW OF
ADMINISTRATIVE LAW JUDGE
DECISIONAL QUALITY

	APPEALED AFFIRMATIONS		ALLOWANCES		UNAPPEALED AFFIRMATIONS		COMPOSITE
	CASES REVIEWED	ACCURACY RATE	CASES REVIEWED	ACCURACY RATE	CASES REVIEWED	ACCURACY RATE	ACCURACY RATE
NATIONAL	32812	91.9	[illegible]	89.2	1506	97.8	91.6
REGION 2	4795	89.7	1059	86.8	178	97.2	89.4
ALBANY NY	184	94.6	50	88.0	9	100.0	93.4
BROWN, J L	52	92.3	6	100.0	3	100.0	93.4
GIBBONS, J F	55	96.4	17	82.4	2	100.0	93.2
MORSE, H	44	95.5	16	87.5	3	100.0	93.7
MURRET, T	33	93.9	11	90.9	1	100.0	93.3
BAYAMON PR	411	91.7	107	73.8			88.0
BUONO PETRILLI, R	64	96.9	25	76.0			91.0
DEJESUSPIZARRO, E	94	93.6	8	87.5			93.1
MERCADO, G J	67	89.6	21	81.0			87.5
PEREZPADILLA, C E	70	95.7	22	59.1			87.0
QUINONES, R	53	90.6	19	73.7			86.1
ROLONRIVERA, J G	63	82.5	12	75.0			81.3
BRONX NY	132	93.9	40	95.0	1	100.0	94.2
BERNSTEIN, I	46	100.0	12	100.0	1	100.0	100.0
KOHLMAN, J W	57	87.7	14	100.0			90.1
LAZARUS, R J	29	96.6	12	83.3			92.7
MORALES-RAMIREZ, O**			1	100.0			100.0
RODNITE, A**			1	100.0			100.0
BROOKLYN NY	453	92.1	107	92.5	14	100.0	92.3
DILORE, J C	11	81.8	44	90.9			89.1
DEVINE, F B	36	100.0	3	100.0	3	100.0	100.0
FORSMITH, H S	55	94.5	9	88.9			93.8
LONDON, M S	29	86.2	9	100.0			89.5
MANOS, J	53	94.3	3	100.0	1	100.0	94.7
MARCELLINO, F	40	85.0	4	100.0	1	100.0	86.7
ROSENBAUM, H	54	94.4	5	100.0			94.9
SILVERMAN, N	49	89.8	5	100.0	2	100.0	91.1
SPIELMAN, T B	28	89.3	9	88.9	3	100.0	90.0
SUGERMAN, R	46	89.1	6	100.0	2	100.0	90.7
TAXEL, M	52	96.2	10	80.0	2	100.0	93.8

**New ALJ may include NRS and special review cases

PREPARED BY OA JUNE 1986

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OVERVIEW OF
ADMINISTRATIVE LAW JUDGE
DECISIONAL QUALITY

	APPEALED AFFIRMATIONS		ALLOWANCES		UNAPPEALED AFFIRMATIONS		COMPOSITE
	CASES REVIEWED	ACCURACY RATE	CASES REVIEWED	ACCURACY RATE	CASES REVIEWED	ACCURACY RATE	ACCURACY RATE
BUFFALO NY	337	89.6	118	78.8	21	100.0	87.4
HALEY, F L	65	89.2	11	63.6	6	100.0	86.6
HARAGOS, N	80	86.3	11	72.7	1	100.0	84.8
HARROP, G W JR	36	94.4	23	78.3	4	100.0	88.9
MARSCHNER, E	38	81.6	24	75.0	3	100.0	80.0
NASH, S J	31	90.3	9	88.9	2	100.0	90.5
QUINN, M J	40	95.0	23	73.9	4	100.0	88.1
WEISBERGER, A	47	93.6	17	100.0	1	100.0	95.4
CAMDEN NJ	346	84.4	50	86.0	16	100.0	85.2
BRONCZYK, A F	81	81.5	12	83.3	6	100.0	82.8
COGGINS, D B	5	40.0					40.0
DANTONI, S J	46	80.4	13	76.9	2	100.0	80.3
HACKERMAN, I	55	94.5	12	100.0	3	100.0	95.7
MAHER, J	61	93.4	5	60.0	1	100.0	91.0
NEFF, A	98	79.6	8	100.0	4	100.0	81.8
HATO REY PR	320	89.4	119	83.2	1	100.0	87.7
ANGLADE, L	30	86.7	12	100.0			90.5
DEJESUS, F	33	93.9	19	89.5	1	100.0	92.5
GOLDMAN, S	64	87.5	1	100.0			87.7
PICO, J H	15	86.7	9	55.6			75.0
RODRIGUEZ, A R	23	91.3	17	82.4			87.5
SANTIAGO, J J	22	81.8	22	86.4			84.1
SAUL, J	49	85.7	4	75.0			84.9
SCHMER, H	22	81.8	21	76.2			79.1
STOWELL, J	52	98.1	4	100.0			98.2
TORO-SOLIS, L	10	100.0	10	80.0			90.0

**New ALJ may include NRS and special review cases

PREPARED BY OA JUNE 1986

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OVERVIEW OF
ADMINISTRATIVE LAW JUDGE
DECISIONAL QUALITY

	APPEALED AFFIRMATIONS		ALLOWANCES		UNAPPEALED AFFIRMATIONS		COMPOSITE
	CASES REVIEWED	ACCURACY RATE	CASES REVIEWED	ACCURACY RATE	CASES REVIEWED	ACCURACY RATE	ACCURACY RATE
HEMPSTEAD NY	211	87.2	102	93.1	12	100.0	89.5
ADLER, A	45	73.3	15	100.0	1	100.0	80.3
ALFIERI, E	17	94.1	15	93.3	3	100.0	94.3
FEINER, J	42	85.7	13	84.6	2	100.0	86.0
HALPERN, J	22	100.0	14	100.0	3	100.0	100.0
LEGUM, H F	40	90.0	17	94.1	2	100.0	91.5
KRAVITZ, M	24	91.7	12	83.3	1	100.0	89.2
ROSEN, L	21	90.5	16	93.8			91.9
JAMAICA NY	278	89.6	27	100.0	17	94.1	90.7
FENSTER, S	47	97.9			2	100.0	98.0
FIER, S	71	90.1	5	100.0	6	100.0	91.5
HOPPENFELD, M P	39	84.6	13	100.0	3	100.0	89.1
NISNEWITZ, D Z	63	81.0	1	100.0	2	100.0	81.8
WIESELTHIER, S	58	94.8	8	100.0	4	75.0	94.3
MANHATTAN N Y	631	87.0	74	93.2	21	85.7	87.6
SCHWARTZ, R	40	85.0	5	80.0			84.4
ANYEL, H	74	90.5	2	100.0	2	50.0	89.7
ASHLEY, L	45	80.0	5	100.0	1	.0	80.4
CERBONE, M	60	86.7	4	100.0	2	100.0	87.9
FRIEDMAN, M P	74	85.1	10	100.0	3	100.0	87.4
GREENBERG, N	43	79.1	9	100.0	1	100.0	83.0
HECHT, M J	42	83.3	3	66.7	1	100.0	82.6
HERZOG, I L	27	81.5	9	88.9			83.3
JACOBS, J F	62	88.7			1	.0	87.3
LIEBERMAN, R P	41	97.6	7	85.7	2	100.0	96.0
PFEIFFER, H	34	85.3	1	100.0	1	100.0	86.1
TANNENBAUM, E	43	93.0	6	100.0	2	100.0	94.1
TANNENBAUM, W	46	91.3	13	92.3	5	100.0	92.2

**New ALJ may include NRS and special review cases

PREPARED BY OA JUNE 1986

OVERVIEW OF
ADMINISTRATIVE LAW JUDGE
DECISIONAL QUALITY

	APPEALED AFFIRMATIONS		ALLOWANCES		UNAPPEALED AFFIRMATIONS		COMPOSITE
	CASES REVIEWED	ACCURACY RATE	CASES REVIEWED	ACCURACY RATE	CASES REVIEWED	ACCURACY RATE	ACCURACY RATE
MAYAGUEZ PR	211	89.6	28	78.6	2	100.0	88.4
GARCIA, A	86	88.4	4	50.0	1	100.0	86.8
VEGA, N E	64	89.1	13	84.6	1	100.0	88.5
VERA, M A R	61	91.8	11	81.8			90.3
NEWARK NJ	411	89.5	88	89.8	34	100.0	90.2
BARLOW, J K	15	86.7	12	91.7	1	100.0	89.3
BRACKEN, J J	39	94.9	14	100.0	4	100.0	96.5
BROWN, L	46	87.0	19	89.5	5	100.0	88.6
FARLEY, J M	48	87.5			2	100.0	88.0
FLIEGLER, I	63	93.7	3	66.7	9	100.0	93.3
LUSTER, R H	29	100.0	9	88.9	2	100.0	97.5
MCNEIL, E	61	85.2	7	71.4	5	100.0	84.9
OCONNEL, J P	61	80.3	13	100.0	3	100.0	84.4
WOODRUFF, R	49	95.9	11	81.8	3	100.0	93.7
ORCALJ NEW YORK	14	92.9	8	75.0	1	100.0	87.0
LEONARD, L	14	92.9	8	75.0	1	100.0	87.0
PONCE PR	221	88.2	36	88.9			88.3
CATONIANTONETTI	61	85.2	6	83.3			85.1
GAUTIER, J R	82	86.6	12	83.3			86.2
LUGOVILANOVA, R	78	92.3	18	94.4			92.7
SYRACUSE NY	368	91.0	86	89.5	14	100.0	91.0
CHWALEK, J P	84	90.5	12	91.7	4	100.0	91.0
JOHNSEN, J C	51	90.2	23	87.0	1	100.0	89.3
MEDICIS, J G	56	92.9	12	91.7	1	100.0	92.8
SCOTT, S V	72	94.4	4	100.0	2	100.0	94.9
TARRANT, J R	58	91.4	18	88.9	3	100.0	91.1
VILHARD, J	47	85.1	17	88.2	3	100.0	86.6

**New ALJ may include NRS and special review cases

PREPARED BY OA JUNE 1986

OVERVIEW OF
ADMINISTRATIVE LAW JUDGE
DECISIONAL QUALITY

	APPEALED AFFIRMATIONS		ALLOWANCES		UNAPPEALED AFFIRMATIONS		COMPOSITE
	CASES REVIEWED	ACCURACY RATE	CASES REVIEWED	ACCURACY RATE	CASES REVIEWED	ACCURACY RATE	ACCURACY RATE
WHITE PLAINS NY	267	93.3	18	88.9	15	93.3	93.0
CELENTANO, R A	67	92.5	5	100.0	5	100.0	93.5
HARAF, F	69	95.7	3	66.7	1	100.0	94.5
PORTNOY, I M	43	93.0	3	100.0	2	100.0	93.8
ROSENSTEIN, H	53	94.3	3	66.7	3	66.7	91.5
ROSS, N	35	88.6	4	100.0	4	100.0	90.7

**New ALJ may include NRS and special review cases

PREPARED BY OA JUNE 1986

APPEALED AFFIRMATIONS--REASONS FOR AC REMAND

This section is intended as a source of information regarding what actions the AC required of the ALJ on remand. Since the AC may require more than a single action, the numbers of reasons for remand may exceed the total number of cases remanded; therefore, total percentages may also exceed 100 percent.

We have also examined the impact of new and material evidence. Whenever there was new and material evidence involvement, the entry appears preceded by an asterisk a second time on the table. This second entry defines the number and percentage of cases with new and material evidence.

The calculations of percentages are as follows:

Entry 1:

1) Percentage remanded equals the number of remands divided by the number of appealed affirmations reviewed multiplied by 100.

2) Percentage for each reason for remand equals the number for each reason divided by number of remands multiplied by 100.

Entry 2 (only new and material evidence):

1) Percentage remanded with new evidence equals the number remanded with new evidence divided by the number remanded multiplied by 100.

2) Percentage for each reason for remand with new evidence equals the number with new evidence for each reason divided by the number for that reason multiplied by 100.

ADMINISTRATIVE LAW JUDGE
DECISIONAL QUALITY

ALLOWANCES
REASONS FOR APPEALS COUNCIL REVERSAL

	REVERSALS		ENGAGED IN SGA		NO SEVERE IMPAIRMENT		CAN DO PAST WORK		RULE		FRAMEWORK OF RULE		OTHER	
	#	%	#	%	#	%	#	%	#	%	#	%	#	%
WHITE PLAINS NY	1	5.6											1	100.0
HARAP,F	1	33.3											1	100.0

**New ALJ may include NRS and special review cases

PREPARED BY OA JUNE 1986

ADMINISTRATIVE LAW JUDGE
DECISIONAL QUALITY

APPEALED AFFIRMATIONS
REASONS FOR APPEALS COUNCIL REMAND

	REMANDS		CONSULTATIVE EXAMINATION		EXISTING EVIDENCE		VOCATIONAL TESTIMONY		MEDICAL TESTIMONY		RE-EVALUATE RECORD		OTHER	
	#	%	#	%	#	%	#	%	#	%	#	%	#	%
HATO REY PR	24	100.0			1	4.2	4	16.7	2	8.3			10	41.7
*HATO REY PR	3	12.5					2	50.0					2	20.0
ANGLADE, L	3	10.0												
DEJESUS, F	1	3.0												
GOLDMAN, S	6	9.4			1	16.7							1	16.7
PICO, J H	1	6.7											1	100.0
RODRIGUEZ, A R	2	8.7					1	50.0					2	100.0
*RODRIGUEZ, A R	1	50.0					1	100.0					1	50.0
SANTIAGO, J J	3	13.6					1	33.3					1	33.3
SAUL, J	6	12.2					2	33.3	2	33.3			5	83.3
*SAUL, J	1	16.7					1	50.0					1	20.0
SCHMER, H	1	4.5												
STOWELL, J	1	1.9												
*STOWELL, J	1	100.0												
HEMPSTEAD NY	11	100.0			2	18.2	2	18.2	2	18.2			3	27.3
*HEMPSTEAD NY	2	18.2					1	50.0					1	33.3
ADLER, A	5	11.1					1	20.0	1	20.0			3	60.0
*ADLER, A	2	40.0					1	100.0					1	33.3
FEINER, J	2	4.8			2	100.0	1	50.0						
LEGUM, H E	3	7.5							1	33.3				
ROSEN, L	1	4.8												
JAMAICA NY	21	100.0			10	47.6	8	38.1	2	9.5	1	4.8	4	19.0
*JAMAICA NY	2	9.5					2	25.0						
FIER, S	5	7.0			3	60.0	3	60.0						
*FIER, S	1	20.0			1	33.3	1	33.3						
HOPPENFELD, M P	5	12.8			3	60.0	2	40.0			1	20.0	1	20.0
NISNEWITZ, D Z	9	14.3			3	33.3	3	33.3	2	22.2			2	22.2
*NISNEWITZ, D Z	1	11.1			1	33.3	1	33.3						
WIESELTHIER, S	2	3.4			1	50.0							1	50.0

**New ALJ may include NRS and special review cases

*New and material evidence involvement.
Multiple remand reasons cause total percents to exceed 100%.

PREPARED BY OA JUNE 1980

ADMINISTRATIVE LAW JUDGE
DECISIONAL QUALITY

APPEALED AFFIRMATIONS
REASONS FOR APPEALS COUNCIL REMAND

	REMANDS		CONSULTATIVE EXAMINATION		EXISTING EVIDENCE		VOCATIONAL TESTIMONY		MEDICAL TESTIMONY		RE-EVALUATE RECORD		OTHER	
	#	%	#	%	#	%	#	%	#	%	#	%	#	%
MANHATTAN N Y	56	100.0			11	19.6	10	17.9	10	17.9	3	5.4	17	30.4
*MANHATTAN N Y	6	10.7					4	40.0					2	11.8
SCHWARTZ, R	4	10.0					1	25.0	2	50.0			1	25.0
ANYEL, H	1	1.4							1	100.0				
ASHLEY, L	8	17.8					1	12.5	2	25.0			3	37.5
*ASHLEY, L	7	25.0					1	100.0					1	33.3
CERRONE, M	6	10.0			1	16.7			1	16.7			2	33.3
FRIEDMAN, M P	9	12.2			4	44.4	1	11.1	1	11.1	2	22.2	3	33.3
*FRIEDMAN, M P	2	22.2			1	25.0	1	100.0					1	33.3
GREENBERG, N	7	16.3			1	14.3	2	28.6					1	14.3
HECHT, M J	5	11.9			1	20.0	1	20.0	1	20.0	1	20.0	2	40.0
HERZOG, I L	3	11.1											1	33.3
JACOBS, J E	5	8.1			2	40.0	1	20.0	1	20.0			1	20.0
*JACOBS, J E	1	20.0			1	50.0	1	100.0						
LIBERMAN, R P	1	2.4												
PFEIFFER, H	2	5.9			1	50.0	1	50.0	1	50.0			1	50.0
TANNENBAUM, E	1	2.3												
TANNENBAUM, W	4	8.7			1	25.0	2	50.0					2	50.0
*TANNENBAUM, W	1	25.0			1	100.0	1	50.0						
MAYAGUEZ PR	20	100.0			3	15.0	2	10.0	3	15.0			6	30.0
*MAYAGUEZ PR	1	5.0					1	50.0						
GARCIA, A	10	11.6			2	20.0	1	10.0	3	30.0			4	40.0
VEGA, N E	5	7.8											1	20.0
VERA, M A R	5	8.2			1	20.0	1	20.0					1	20.0
*VERA, M A R	1	20.0			1	100.0	1	100.0						

**New ALJ may include NRS and special review cases

*New and material evidence involvement.
Multiple remand reasons cause total percents to exceed 100%.

PREPARED BY OA JUNE 1986

ADMINISTRATIVE LAW JUDGE
DECISIONAL QUALITY

APPEALED AFFIRMATIONS
REASONS FOR APPEALS COUNCIL REMAND

	REMANDS		CONSULTATIVE EXAMINATION		EXISTING EVIDENCE		VOCATIONAL TESTIMONY		MEDICAL TESTIMONY		RE-EVALUATE RECORD		OTHER	
	#	%	#	%	#	%	#	%	#	%	#	%	#	%
WHITE PLAINS NY	8	100.0			2	25.0	1	12.5	3	37.5			1	12.5
*WHITE PLAINS NY	2	25.0					1	100.0	2	66.7				
CELENTANO,R A	2	3.0												
HARAP,F	2	2.9			1	50.0	1	50.0	1	50.0				
*HARAP,F	1	50.0					1	100.0	1	100.0				
PORTNOY,I M	3	7.0			1	33.3			1	33.3				
*PORTNOY,I M	1	33.3			1	100.0			1	100.0				
ROSS,N	1	2.9							1	100.0			1	100.0

**New ALJ may include NRS and special review cases

*New and material evidence involvement.
Multiple remand reasons cause total percents to exceed 100%.

PREPARED BY OA JUNE 1986

APPEALED AFFIRMATIONS--REASONS FOR AC REVERSAL

This section provides insight into the reason behind the AC decision to issue a decision favorable to the claimant after the ALJ had issued a denial. Although in most instances only a single reason is required for an AC reversal, OAO analysts sometimes reported that more than one reason existed.

The impact of new and material evidence is shown both overall for reversals and for each reason. The second entry for a region, hearing office, etc., shows the number and percent of cases with new and material evidence involvement.

The calculations of percentages are as follows:

Entry 1:

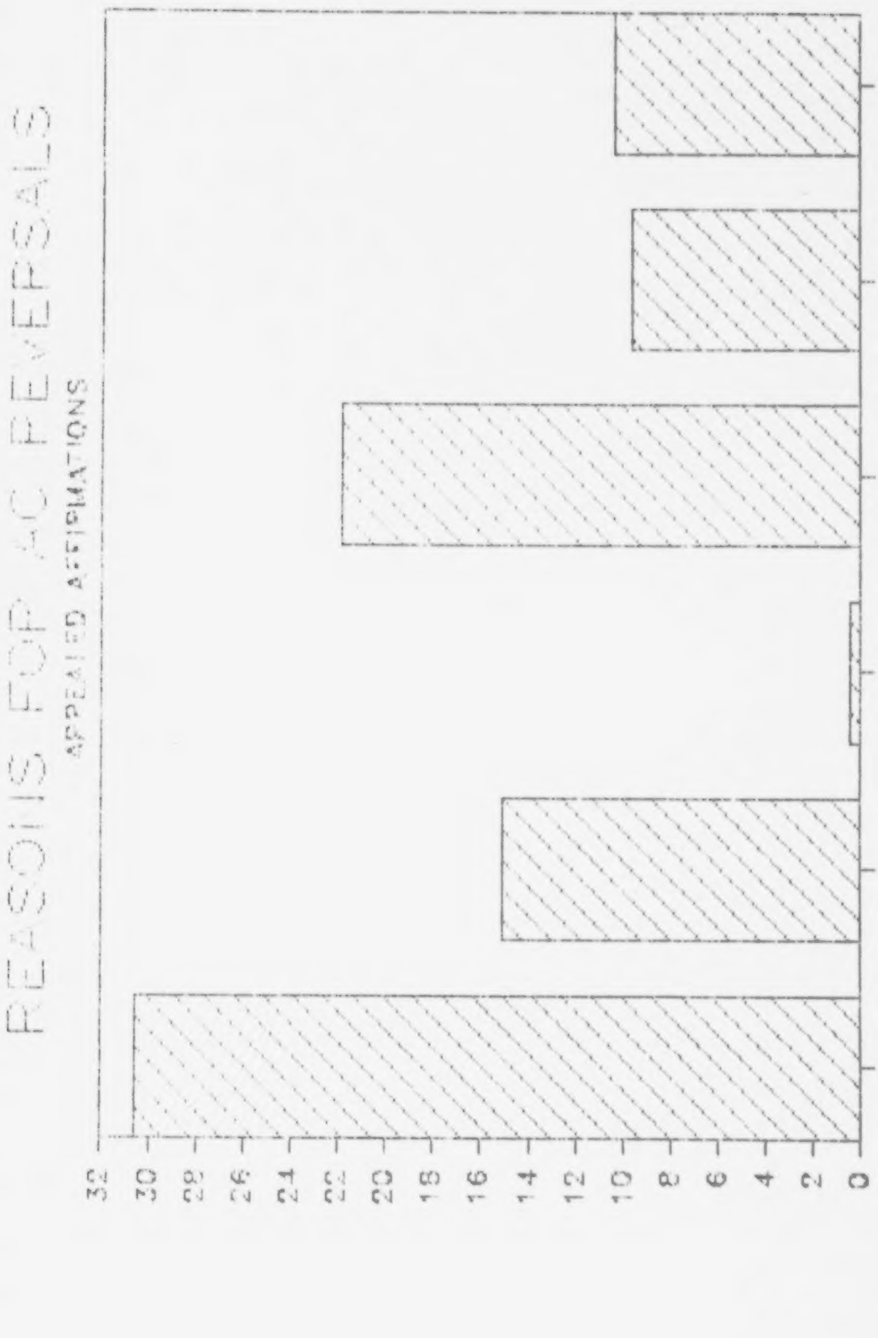
1) Percentage of reversals equals the number of reversals divided by the number of appealed affirmations reviewed multiplied by 100.

2) Percentage for each reason for reversal equals the number for each reason divided by the number of reversals multiplied by 100.

Entry 2 (only new and material evidence):

1) Percentage of reversals with new evidence equals number of reversals with new evidence divided by the number of reversals multiplied by 100.

2) Percentage for each reason for remand with new evidence equals the number for each reason divided by the number for that reason multiplied by 100.


REASONS FOR AC REVERSALS
APPEALED AFFIRMATIONS
32
30
28
26
24
22
20
18
16
14
12
10
8
6
4
2
0
MEETS LIST.
EQUALS LIST.
SPECIAL
RULE
FRAMEWORK
OTHER

ADMINISTRATIVE LAW JUDGE
DECISIONAL QUALITY

APPEALED AFFIRMATIONS
REASONS FOR APPEALS COUNCIL REVERSAL

	REVERSALS		MEETS LISTING		EQUALS LISTING		404.1562 416.962		RULE		FRAMEWORK OF RULES		OTHER	
	#	%	#	%	#	%	#	%	#	%	#	%	#	%
NATIONAL	741	2.3	227	30.6	112	15.1	4	.5	162	21.9	72	9.7	77	10.4
*NATIONAL	186	25.1	65	28.6	46	41.1			21	13.0	13	18.1	19	24.7
REGION 2	131	2.7	29	22.1	17	13.0			28	21.4	19	14.5	17	13.0
*REGION 2	29	22.1	9	31.0	6	35.3			4	14.3				
ALBANY NY	2	1.1	1	50.0							1	50.0		
*ALBANY NY	1	50.0	1	100.0										
BROWN, J L	1	1.9	1	100.0										
*BROWN, J L	1	100.0	1	100.0										
MURKET, T	1	3.0									1	100.0		
BAYAMON PR	5	1.2	1	20.0					1	20.0	1	20.0	1	20.0
DEJESUSPIZARRO, E	1	1.1	1	100.0										
QUINONES, R	1	1.9												
ROLONRIVERA, J G	3	4.8							1	33.3	1	33.3	1	33.3
BRONX NY	1	.8									1	100.0		
KOHLMAN, J W	1	1.8									1	100.0		
BROOKLYN NY	13	2.9			1	7.7			6	46.2	3	23.1	2	15.4
*BROOKLYN NY	2	15.4			1	100.0			1	16.7				
FORSMITH, H S	2	3.6									1	50.0	1	50.0
LONDON, M S	1	3.4							1	100.0				
*LONDON, M S	1	100.0							1	100.0				
MANOS, J	1	1.9			1	100.0								
*MANOS, J	1	100.0			1	100.0								
MARCELLINO, F	2	5.0							2	100.0				
SILVERMAN, N	2	4.1							2	100.0	1	50.0		
SPIELMAN, I B	1	3.6									1	100.0		
SUGERMAN, R	2	4.3												
TAXEL, M	2	3.8							1	50.0			1	50.0

**New ALJ may include NRS and special review cases

*New and material evidence involvement.

PREPARED BY OA JUNE 1986

ADMINISTRATIVE LAW JUDGE
DECISIONAL QUALITY

APPEALED AFFIRMATIONS
REASONS FOR APPEALS COUNCIL REVERSAL

	REVERSALS		MEETS LISTING		EQUALS LISTING		404.1562 416.962		RULE		FRAMEWORK OF RULES		OTHER	
	#	%	#	%	#	%	#	%	#	%	#	%	#	%
BUFFALO NY	9	2.7	3	33.3	2	22.2			2	22.2	1	11.1	1	11.1
*BUFFALO NY	3	33.3	2	66.7	1	50.0								
HALEY, F L	1	1.5	1	100.0										
HARAGOS, N	4	5.0	2	50.0					1	25.0	1	25.0		
*HARAGOS, N	2	50.0	2	100.0										
HARROP, G W JR	1	2.8							1	100.0				
MARSCHNER, E	1	2.6			1	100.0								
*MARSCHNER, E	1	100.0			1	100.0								
NASH, S J	1	3.2											1	100.0
WEISBERGER, A	1	2.1			1	100.0								
CAMDEN NJ	21	6.1	7	33.3	3	14.3			5	23.8			2	9.5
*CAMDEN NJ	2	9.5	1	14.3					1	20.0				
BRONCZYK, A F	6	7.4	1	16.7	3	50.0			2	33.3				
COGGINS, D B	2	40.0	1	50.0										
DANTONI, S J	3	6.5	2	66.7					1	33.3				
*DANTONI, S J	2	66.7	1	50.0					1	100.0				
HOLKERMAN, I	1	1.8											1	100.0
MAHER, J	1	1.6	1	100.0										
NEFF, A	8	8.2	2	25.0					2	25.0			1	12.5
HATO REY PR	7	2.2	2	28.6	1	14.3			1	14.3			2	28.6
*HATO REY PR	1	14.3	1	50.0										
ANGLADE, L	1	3.3											1	100.0
GOLDMAN, S	2	3.1	1	50.0	1	50.0								
PICO, J H	1	6.7							1	100.0				
SAUL, J	1	2.0	1	100.0										
*SAUL, J	1	100.0	1	100.0										
SCHMER, H	2	9.1											1	50.0

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PREPARED BY OA JUNE 1986

ADMINISTRATIVE LAW JUDGE
DECISIONAL QUALITY

APPEALED AFFIRMATIONS
REASONS FOR APPEALS COUNCIL REVERSAL

	REVERSALS		MEETS LISTING		EQUALS LISTING		404.1562 416.962		RULE		FRAMEWORK OF RULES		OTHER	
	#	%	#	%	#	%	#	%	#	%	#	%	#	%
HEMPSTEAD NY	13	6.2	1	7.7					3	23.1	2	15.4	3	23.1
*HEMPSTEAD NY	2	15.4	1	100.0										
ADLER, A	6	13.3							2	33.3	2	33.3	1	16.7
*ADLER, A	1	16.7												
ALFIERI, E	1	5.9							1	100.0				
FEINER, J	3	7.1	1	33.3										
*FEINER, J	1	33.3	1	100.0										
PRAVITZ, M	2	8.3											1	50.0
ROSEN, L	1	4.8											1	100.0
JAMAICA NY	5	1.8	1	20.0					2	40.0			1	20.0
FENSTER, S	1	2.1												
FIER, S	2	2.8							2	100.0				
NISNEWITZ, D Z	1	1.6	1	100.0										
WIESELTHIER, S	1	1.7											1	100.0
MANHATTAN N Y	18	2.9	3	16.7	1	5.6			6	33.3	1	5.6	2	11.1
*MANHATTAN N Y	4	22.2							2	33.3	1	100.0		
SCHWARTZ, R	2	5.0	1	50.0					1	50.0				
ANYEL, H	4	5.4	1	25.0					3	75.0				
*ANYEL, H	1	25.0							1	33.3				
ASHLEY, L	1	2.2							1	100.0				
CERBONE, M	2	3.3							1	50.0	1	50.0		
*CERBONE, M	2	100.0							1	100.0	1	100.0		
HECHT, M J	2	4.8			1	50.0								
HERZOG, I L	1	3.7											1	100.0
JACOBS, J E	2	3.2											1	50.0
*JACOBS, J E	1	50.0												
PFEIFFER, H	2	5.9	1	50.0										
TANNENBAUM, E	2	4.7												

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PREPARED BY OA JUNE 1986

ADMINISTRATIVE LAW JUDGE
DECISIONAL QUALITY

APPEALED AFFIRMATIONS
REASONS FOR APPEALS COUNCIL REVERSAL

	REVERSALS		MEETS LISTING		EQUALS LISTING		404.1562 416.962		RULE		FRAMEWORK OF RULES		OTHER	
	#	%	#	%	#	%	#	%	#	%	#	%	#	%
MAYAGUEZ PR	2	.9	1	50.0	1	50.0								
VEGA,N E	2	3.1	1	50.0	1	50.0								
NEWARK NJ	13	3.2	5	38.5	3	23.1					1	7.7	1	7.7
*NEWARK NJ	4	30.8	1	20.0	2	66.7								
BROWN,L	2	4.3	1	50.0										
FARLEY,J M	2	4.2												
FLIEGLER,I	2	3.2												
*FLIEGLER,I	1	50.0									1	50.0		
MCNEIL,E	3	4.9	1	33.3	3	100.0								
*MCNEIL,E	2	66.7			2	66.7								
OCONNEL,J P	3	4.9	2	66.7									1	33.3
WOODRUFF,R	1	2.0	1	100.0										
*WOODRUFF,R	1	100.0	1	100.0										
ORCALJ NEW YORK	1	7.1							1	100.0				
LEONARD,L	1	7.1							1	100.0				
PONCE PR	4	1.8	1	25.0					1	25.0			2	50.0
*PONCE PR	2	50.0											2	100.0
CATONIANTONETTI	2	3.3	1	50.0					1	50.0				
GAUTIER,J R	1	1.2											1	100.0
*GAUTIER,J R	1	100.0											1	100.0
LUGOVILANOVA,R	1	1.3											1	100.0
*LUGOVILANOVA,R	1	100.0											1	100.0
SYRACUSE NY	10	2.7	1	10.0	2	20.0					6	60.0		
*SYRACUSE NY	4	40.0	1	100.0							3	50.0		
CHWALEK,J P	3	3.6			1	33.3					1	33.3		
JOHNSON,J C	1	2.0			1	100.0								
MEDICIS,J G	3	5.4									3	100.0		
*MEDICIS,J G	1	33.3									1	33.3		
TARRANT,J R	2	3.4	1	50.0							1	50.0		
*TARRANT,J R	2	100.0	1	100.0							1	100.0		
VOLHARD,J	1	2.1									1	100.0		
*VOLHARD,J	1	100.0									1	100.0		

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PREPARED BY OA JUNE 1986

ADMINISTRATIVE LAW JUDGE
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APPEALED AFFIRMATIONS
REASONS FOR APPEALS COUNCIL REVERSAL

	REVERSALS		MEETS LISTING		EQUALS LISTING		404.1562 416.962		RULE		FRAMEWORK OF RULES		OTHER	
	#	%	#	%	#	%	#	%	#	%	#	%	#	%
WHITE PLAINS NY	7	2.6	2	28.6	3	42.9					2	28.6		
*WHITE PLAINS NY	4	57.1	1	50.0	2	66.7					1	50.0		
CELENTANO, R A	2	3.0			2	100.0								
*CELENTANO, R A	1	50.0			1	50.0								
HARAP, F	1	1.4	1	100.0										
ROSENSTEIN, H	1	1.9			1	100.0								
*ROSENSTEIN, H	1	100.0			1	100.0								
ROSS, N	3	8.6	1	33.3							2	66.7		
*ROSS, N	2	66.7	1	100.0							1	50.0		

**New ALJ may include NRS and special review cases

*New and material evidence involvement.

PREPARED BY OA JUNE 1986

ADMINISTRATIVE LAW JUDGE
DECISIONAL QUALITY

ALLOWANCES
REASONS FOR APPEALS COUNCIL REVERSAL

	REVERSALS		ENGAGED IN SGA		NO SEVERE IMPAIRMENT		CAN DO PAST WORK		RULE		FRAMEWORK OF RULE		OTHER	
	#	%	#	%	#	%	#	%	#	%	#	%	#	%
NATIONAL	345	4.0	0	.0	25	7.2	109	31.6	110	31.9	57	16.5	28	8.1
REGION 2	64	6.0	0	.0	7	10.9	20	31.3	19	29.7	11	17.2	6	9.4
ALBANY NY	1	2.0					1	100.0						
MURRET, T	1	9.1					1	100.0						
BAYAMON PR	14	13.1			4	28.6	4	28.6	4	28.6	2	14.3		
BUONO PETRILLI, R	2	8.0					1	50.0			1	50.0		
DEJESUSPIZARRO, E	1	12.5			1	100.0								
MERCADO, G J	2	9.5							2	100.0				
PEREZPADILLA, C E	5	22.7			2	40.0	2	40.0	1	20.0				
QUINONES, R	2	10.5					1	50.0	1	50.0				
ROLONRIVERA, J G	2	16.7			1	50.0					1	50.0		
BRONX NY	2	5.0					1	50.0			1	50.0		
LAZARUS, R J	2	16.7					1	50.0			1	50.0		
BROOKLYN NY	3	2.8					1	33.3	2	66.7				
DITORE, J C	3	6.8					1	33.3	2	66.7				
BUFFALO NY	12	10.2			1	8.3	5	41.7	4	33.3			2	16.7
HALEY, F L	2	18.2											2	100.0
HARAGOS, N	2	18.2							2	100.0				
HARROP, G W JR	2	8.7					2	100.0						
MARSCHNER, E	2	8.3					1	50.0	1	50.0				
NASH, S J	1	11.1					1	100.0						
QUINN, M J	3	13.0			1	33.3	1	33.3	1	33.3				
CAMDEN NJ	3	6.0					1	33.3			1	33.3		
BRONCZYK, A F	1	8.3									1	100.0		
DANTONI, S J	2	15.4					1	50.0						

**New ALJ may include NRS and special review cases

PREPARED BY OA JUNE 1986

ADMINISTRATIVE LAW JUDGE
DECISIONAL QUALITY

ALLOWANCES
REASONS FOR APPEALS COUNCIL REVERSAL

	REVERSALS		ENGAGED IN SGA		NO SEVERE IMPAIRMENT		CAN DO PAST WORK		RULE		FRAMEWORK OF RULE		OTHER	
	#	%	#	%	#	%	#	%	#	%	#	%	#	%
HATO REY PR	14	11.8			2	14.3	5	35.7	4	28.6	2	14.3	1	7.1
DEJESUS,F	2	10.5					1	50.0	1	50.0				
PICO,J H	3	33.3			1	33.3					1	33.3	1	33.3
RODRIGUEZ,A R	2	11.8					2	100.0						
SANTIAGO,J J	1	4.5							1	100.0				
SAUL,J	1	25.0									1	100.0		
SCHMER,H	3	14.3			1	33.3	1	33.3	1	33.3				
TORO-SOLIS,L	2	20.0					1	50.0	1	50.0				
HEMPSTEAD NY	2	2.0					1	50.0	1	50.0				
ALFIERI,E	1	6.7							1	100.0				
PRAVITZ,M	1	8.3					1	100.0						
MANHATTAN N Y	3	4.1					1	33.3	1	33.3	1	33.3		
SCHWARTZ,R	1	20.0							1	100.0				
LIBERMAN,R P	1	14.3					1	100.0						
TANNENBAUM,W	1	7.7									1	100.0		
MAYAGUEZ PR	3	10.7							2	66.7	1	33.3		
GARCIA,A	1	25.0							1	100.0				
VERA,M A R	2	18.2							1	50.0	1	50.0		
PONCE PR	3	8.3									2	66.7	1	33.3
CATONIANTONETTI	1	16.7											1	100.0
GAUTIER,J R	2	16.7									2	100.0		
SYRACUSE NY	3	3.5							1	33.3	1	33.3	1	33.3
MEDICIS,J G	1	8.3											1	100.0
TARRANT,J R	1	5.6									1	100.0		
VOLHARD,J	1	5.9							1	100.0				

**New ALJ may include NRS and special review cases

PREPARED BY OA JUNE 1986

ANALYSIS OF MENTAL IMPAIRMENT DATA

In mid February 1986, the Office of Appraisal, in conjunction with the Office of Appeals Operations, instituted a data collection effort designed to measure the accuracy with which OHA adjudicators are dealing with cases where mental impairments are at issue. These efforts came about as a result of the requirements of the Social Security Benefits Reform Act of 1984. Data collection is being conducted as a part of the regular OHA review of ALJ decisions.

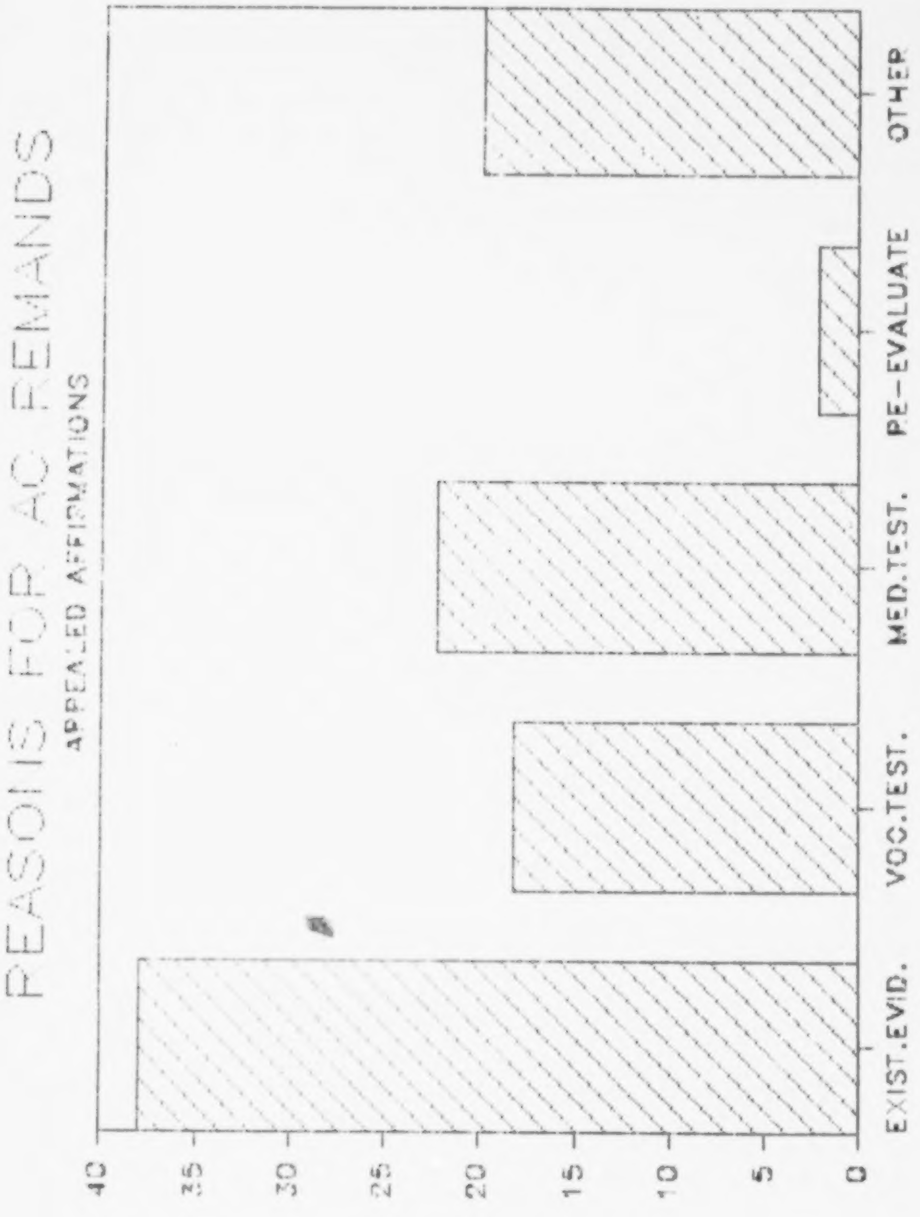
In essence, this data collection and analysis initiative has thus far revealed no significant adjudicative problems. However, we would caution that the amount of OHA case processing experience has been limited. As of June 1, we had automated information on 275 ALJ allowances and 42 ALJ denials. Summary data is provided on the attached tables. Although the small numbers of cases involved prevent the development of reliable conclusions, comments are presented below which summarize the most salient findings:

1) Minor errors in PRTF completion were found by OAO analysts in slightly over 20 percent of the cases. Nevertheless, the Appeals Council did not, as a rule, consider these oversights to be sufficiently serious to warrant review action. Indeed, the accuracy rate for ALJ allowances in this small group of cases was very high (97 percent). The accuracy rate for ALJ denials was somewhat lower (81 percent).

2) One of the most striking findings in this early examination of mental impairment case adjudication involves the issue of the "changed record." Additional evidence was submitted at the ALJ hearing level in 53 percent of the ALJ allowances and 31 percent of the ALJ denials. The presence of additional evidence may help to explain the finding that, in most of the cases evaluated to date, the medical record was adequate to provide a longitudinal picture of the claimant's mental status.

3) As might be anticipated, use of the revised mental criteria appears to be associated with an increase in medical advisor input. The increase, though, was relatively slight in this group of cases. On balance, we believe that it would be premature to draw any firm conclusions at this juncture regarding the potential impact of the new mental standards on medical advisor utilization.

As OHA gains adjudicative experience with the revised mental criteria, and as data becomes available on a larger number of cases, we expect to be able to delineate any difficulties with a greater degree of precision.


REASONS FOR AC REMANDS
APPEALED AFFIRMATIONS
40
35
30
25
20
15
10
5
0
EXIST.EVID.
VOC.TEST.
MED.TEST.
RE-EVALUATE
OTHER

ADMINISTRATIVE LAW JUDGE
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APPEALED AFFIRMATIONS
REASONS FOR APPEALS COUNCIL REMAND

	REMANDS		CONSULTATIVE EXAMINATION		EXISTING EVIDENCE		VOCATIONAL TESTIMONY		MEDICAL TESTIMONY		RE-EVALUATE RECORD		OTHER	
	#	%	#	%	#	%	#	%	#	%	#	%	#	%
NATIONAL	1743	5.3	0	.0	662	38.0	318	18.2	389	22.3	37	2.1	346	19.9
*NATIONAL	288	16.5			176	26.6	118	37.1	38	9.8	5	13.5	22	6.4
REGION 2	327	6.8			93	28.4	61	18.7	51	15.6	8	2.4	88	26.9
*REGION 2	35	10.7			13	20.4	21	34.4	3	5.9	5	62.5	2	2.3
ALBANY NY	8	100.0			1	12.5	1	12.5	3	37.5			4	50.0
BROWN, J L	3	5.8											3	100.0
GIBBONS, J F	2	3.6			1	50.0	1	50.0	1	50.0			1	50.0
MORSE, H	2	4.5							1	50.0				
MURRET, T	1	3.0							1	100.0				
BAYAMON PR	27	100.0			4	14.8	3	11.1	2	7.4	1	3.7	10	37.0
*BAYAMON PR	1	3.7												
BUONO PETRILLI, R	2	3.1							1	50.0				
DEJESUSPIZARRO, E	5	5.3			1	20.0	1	20.0					3	60.0
MERCADO, G J	7	10.4			3	42.9	1	14.3	1	14.3			1	14.3
*MERCADO, G J	1	14.3												
PEREZPADILLA, C E	2	2.9											1	50.0
QUINONES, R	4	7.5					1	25.0			1	25.0	2	50.0
ROLONRIVERA, J G	7	11.1											3	42.9
BRONX NY	7	100.0					1	14.3					3	42.9
*BRONX NY	2	28.6					1	100.0						
KOHLMAN, J W	6	10.5					1	16.7					2	33.3
*KOHLMAN, J W	2	33.3					1	100.0						
LAZARUS, R J	1	3.4											1	100.0

**New ALJ may include NHS and special review cases

*New and material evidence involvement.
Multiple remand reasons cause total percents to exceed 100%.

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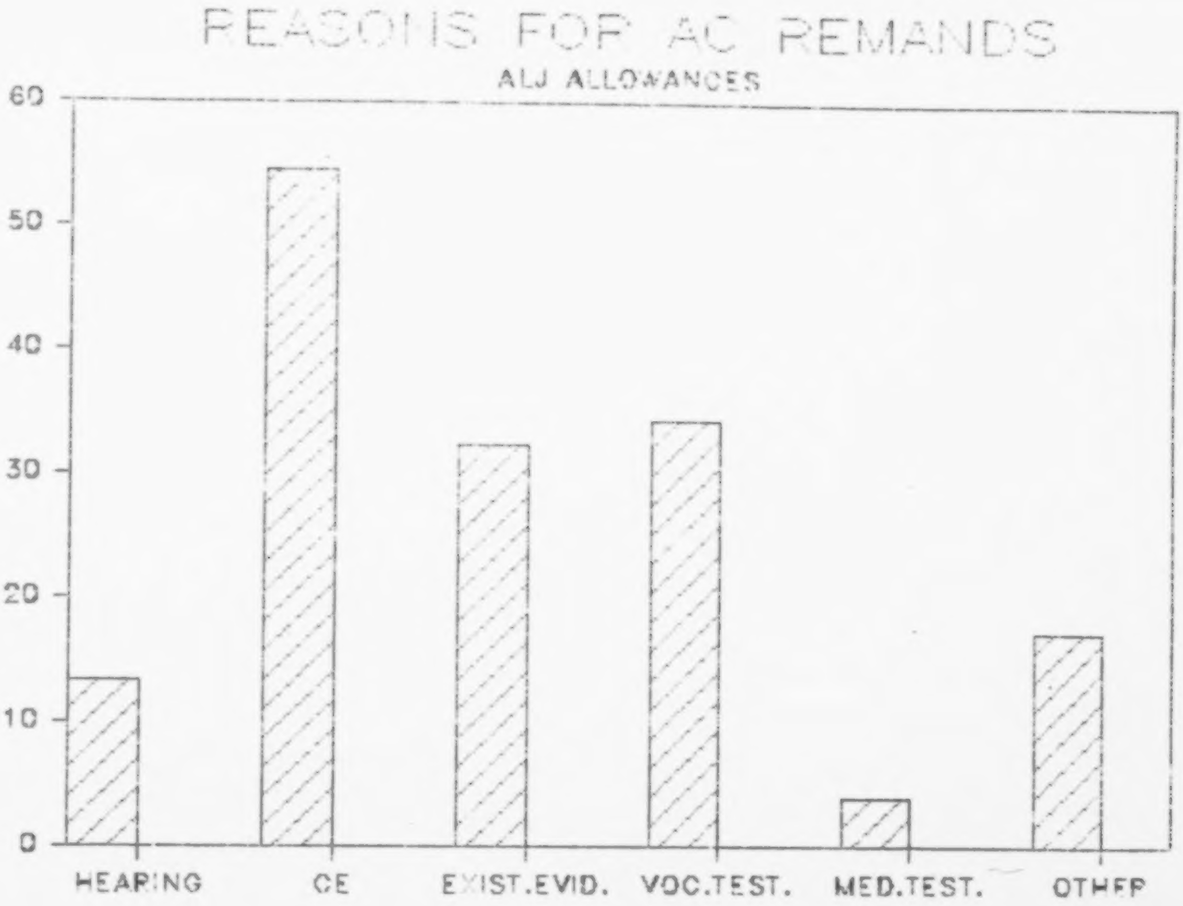
ALLOWANCES--REASONS FOR AC REMAND

This section provides information regarding the reasons that the AC remanded favorable ALJ decisions. The fact that multiple remand reasons can exist in a single case causes the total number of reasons to exceed the number of remands.

Percentages are computed as follows:

1) Percentage remanded equals the number of remands divided by the number of allowances reviewed multiplied by 100.

2) Percentage for each reason for remand equals the number for each reason divided by the number of remands multiplied by 100.


REASONS FOR AC REMANDS
ALJ ALLOWANCES
60
50
40
30
20
10
0
HEARING
CE
EXIST.EVID.
VOC.TEST.
MED.TEST.
OTHER

ADMINISTRATIVE LAW JUDGE
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ALLOWANCES
REASONS FOR APPEALS COUNCIL REMAND

	REMANDS		HEARING		CONSULTATIVE EXAMINATION		EXISTING EVIDENCE		VOCATIONAL TESTIMONY		MEDICAL TESTIMONY		OTHER	
	#	%	#	%	#	%	#	%	#	%	#	%	#	%
NATIONAL	425	5.0	57	13.4	232	54.6	138	32.5	146	34.4	17	4.0	74	17.4
REGION 2	56	5.3	10	17.9	31	55.4	26	46.4	11	19.6	6	10.7	14	25.0
ALBANY NY	5	10.0	1	20.0	2	40.0			2	40.0				
GIBBONS, J F	3	17.6			1	33.3			2	66.7				
MORSE, H	2	12.5	1	50.0	1	50.0								
BAYAMON PR	12	11.2			5	41.7	7	58.3	1	8.3	2	16.7	4	33.3
BUONO PETRILLI, R	4	16.0			2	50.0	1	25.0			1	25.0	2	50.0
MERCADO, G J	1	4.8					1	100.0						
PEREZPADILLA, C E	4	18.2			1	25.0	3	75.0	1	25.0			2	50.0
QUINONES, R	3	15.8			2	66.7	2	66.7			1	33.3		
BROOKLYN NY	3	2.8			2	66.7	1	33.3					1	33.3
DITORE, J C	1	2.3					1	100.0					1	100.0
SPIELMAN, I B	1	11.1			1	100.0								
TAXEL, M	1	10.0			1	100.0								
BUFFALO NY	10	8.5	5	50.0	4	40.0	6	60.0	3	30.0	1	10.0	2	20.0
HALEY, F L	2	18.2	1	50.0			1	50.0	1	50.0				
HARROP, G W JR	2	8.7	1	50.0	1	50.0	2	100.0						
MARSCHNER, E	4	16.7	3	75.0	1	25.0	1	25.0	2	50.0	1	25.0	2	50.0
QUINN, M J	2	8.7			2	100.0	2	100.0						
CAMDEN NJ	3	6.0			2	66.7	1	33.3	1	33.3			2	66.7
BRONCZYK, A F	1	8.3			1	100.0			1	100.0				
DANTONI, S J	1	7.7			1	100.0	1	100.0						
MAHER, J	1	20.0											2	200.0

**New ALJ may include NRS and special review cases

Multiple remand reasons cause total percents to exceed 100%.

PREPARED BY OA JUNE 1986

ADMINISTRATIVE LAW JUDGE
DECISIONAL QUALITY

ALLOWANCES
REASONS FOR APPEALS COUNCIL REMAND

	REMANDS		HEARING		CONSULTATIVE EXAMINATION		EXISTING EVIDENCE		VOCATIONAL TESTIMONY		MEDICAL TESTIMONY		OTHER	
	#	%	#	%	#	%	#	%	#	%	#	%	#	%
HATO REY PR	5	4.2	1	20.0	4	80.0	3	60.0	1	20.0			2	40.0
PICO, J H	1	11.1			1	100.0	1	100.0						
SANTIAGO, J J	2	9.1	1	50.0	1	50.0	1	50.0	1	50.0			2	100.0
SCHMER, H	2	9.5			2	100.0	1	50.0						
HEMPSTEAD NY	3	2.9			2	66.7	1	33.3					2	66.7
LEGUM, H E	1	5.9			1	100.0							1	100.0
PRAVITZ, M	1	8.3					1	100.0					1	100.0
ROSEN, L	1	6.3			1	100.0								
MANHATTAN N Y	2	2.7	1	50.0	1	50.0	1	50.0			1	50.0		
HECHT, M J	1	33.3			1	100.0	1	100.0			1	100.0		
HERZOG, I L	1	11.1	1	100.0										
MAYAGUEZ PR	1	3.6					1	100.0			1	100.0		
VEGA, N E	1	7.7					1	100.0			1	100.0		
NEWARK NJ	6	6.8	1	16.7	4	66.7	3	50.0	2	33.3			1	16.7
BARLOW, J K	1	8.3			1	100.0								
BROWN, L	2	10.5			2	100.0	2	100.0	1	50.0			1	50.0
BUTLER, B H	1	11.1												
MCNEIL, E	1	14.3	1	100.0					1	100.0				
WOODRUFF, R	1	9.1			1	100.0	1	100.0						
NEWALJ NEW YORK	1	12.5	1	100.0	1	100.0					1	100.0		
LEONARD, L	1	12.5	1	100.0	1	100.0					1	100.0		
SYRACUSE NY	5	5.8			4	80.0	2	40.0	1	20.0				
CHWALEK, J P	1	8.3					1	100.0						
JOHNSEN, J C	3	13.0			3	100.0	1	33.3						
TARRANT, J R	1	5.6			1	100.0			1	100.0				

**New ALJ may include NRS and special review cases

Multiple remand reasons cause total percents to exceed 100%.

PREPARED BY OA JUNE 1986

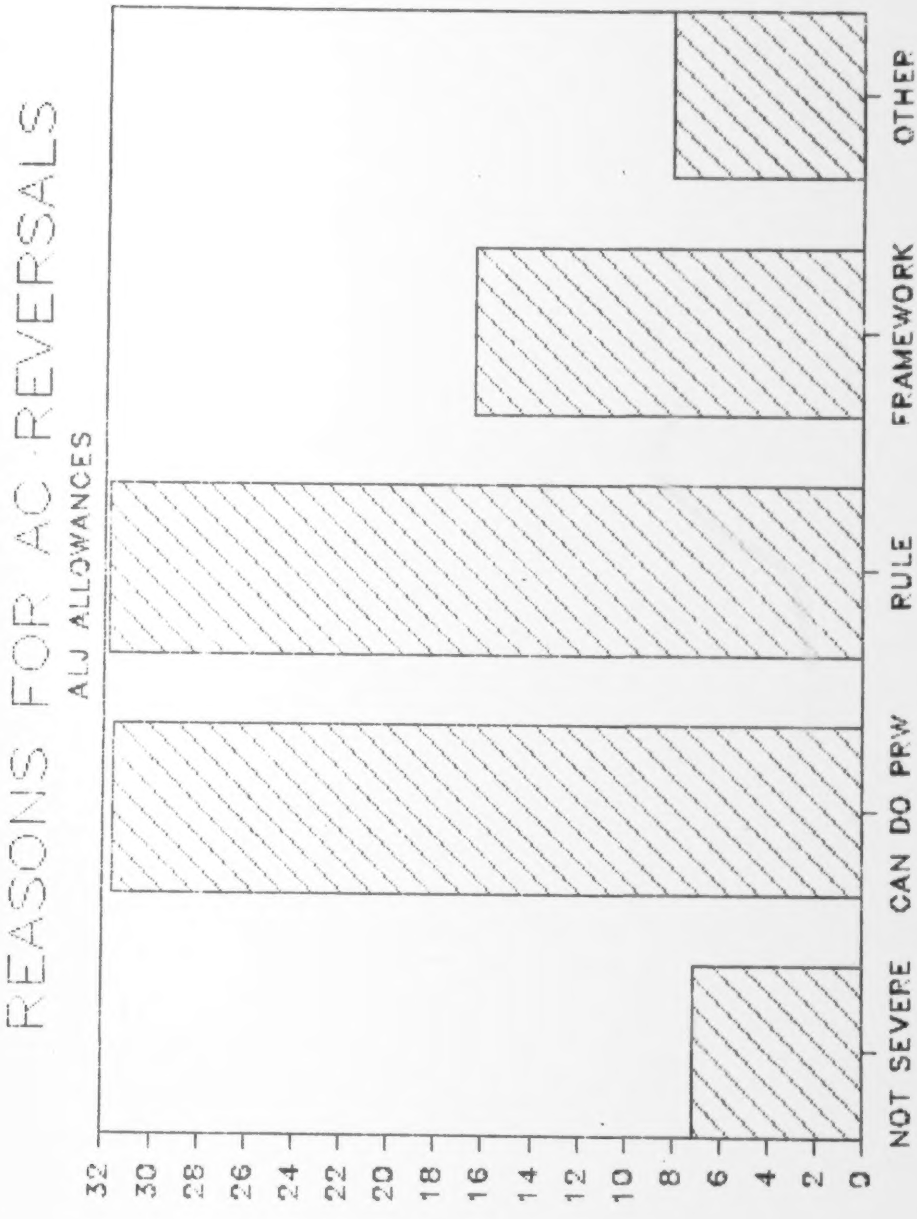
ALLOWANCES--REASON FOR AC REVERSAL

This section provides information regarding the reason that the AC reversed ALJ favorable decisions. Although only a single reason for reversal is necessary, in a few instances, the analysts indicated multiple reasons; therefore, the total number of reasons may exceed the number of reversals.

Calculations are performed as follows:

1) Percentage of reversals equals the number of reversals divided by the number of allowances reviewed multiplied by 100.

2) Percentage for each reason for reversal equals the number for each reason divided by the number of reversals multiplied by 100.


REASONS FOR AC REVERSALS
ALJ ALLOWANCES
32
30
28
26
24
22
20
18
16
14
12
10
8
6
4
2
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NOT SEVERE
CAN DO PRW
RULE
FRAMEWORK
OTHER

ADMINISTRATIVE LAW JUDGE
DECISIONAL QUALITY

APPEALED AFFIRMATIONS
REASONS FOR APPEALS COUNCIL REMAND

	REMANDS		CONSULTATIVE EXAMINATION		EXISTING EVIDENCE		VOCATIONAL TESTIMONY		MEDICAL TESTIMONY		RE-EVALUATE RECORD		OTHER	
	#	%	#	%	#	%	#	%	#	%	#	%	#	%
NEWARK NJ	27	100.0			14	51.3	5	18.5	4	14.8			5	18.5
*NEWARK NJ	6	22.2					4	80.0	1	25.0			1	20.0
BARLOW, J K	1	6.7											1	100.0
BRACKEN, J J	2	5.1			1	50.0								
BROWN, L	4	8.7			2	50.0	1	25.0					1	25.0
FARLEY, J M	4	8.3			1	75.0			2	50.0			1	25.0
FLIEGLER, I	2	3.2			2	100.0								
*FLIEGLER, I	1	50.0			1	50.0								
MCNEIL, E	4	6.6			3	75.0	2	50.0					1	25.0
*MCNEIL, E	2	50.0			2	66.7	2	100.0					1	100.0
OCONNEL, J P	9	14.8			5	55.6	2	22.2	1	11.1			1	11.1
*OCONNEL, J P	3	33.3			2	40.0	2	100.0	1	100.0				
WOODRUFF, R	1	2.0							1	100.0				
PONCE PR	22	100.0			2	9.1	3	13.6					8	36.4
*PONCE PR	1	4.5												
CATONIANTONETTI	7	11.5			1	14.3	1	14.3					1	14.3
*CATONIANTONETTI	1	14.3												
GAUTIER, J R	10	12.2			1	10.0	2	20.0					4	40.0
LUGOVILANOVA, R	5	6.4											3	60.0
SYRACUSE NY	20	100.0			11	55.0	7	35.0	6	30.0	2	10.0	6	30.0
*SYRACUSE NY	3	15.0					2	28.6						
CHWALEK, J P	4	4.8			2	50.0	1	25.0	1	25.0			1	25.0
*CHWALEK, J P	1	25.0			1	50.0								
JOHNSEN, J C	4	7.8			3	75.0	2	50.0	2	50.0			1	25.0
*JOHNSEN, J C	1	25.0			1	33.3	1	50.0						
MEDICIS, J G	1	1.8			1	100.0	1	100.0					1	100.0
SCOTT, S V	3	4.2					1	33.3	1	33.3			1	33.3
TARRANT, J R	2	3.4			2	100.0	1	50.0	1	50.0	1	50.0		
*TARRANT, J R	1	50.0			1	50.0	1	100.0						
VOLHARD, J	6	12.8			3	50.0	1	16.7	1	16.7	1	16.7	2	33.3

**New ALJ may include NRS and special review cases

*New and material evidence involvement.
Multiple remand reasons cause total percents to exceed 100%.

PREPARED BY OA JUNE 1986

Senator **Heflin**. Thank you.
Judge O'Byrne.

STATEMENT OF FRANCIS J. O'BYRNE

Judge **O'Byrne**. Senators, it is an honor for me to appear before you today. You have a copy of my prepared testimony. I shall not read that testimony, but refer to portions of the statement.

Attached to my statement is a copy of a speech that was delivered to the American Society of Law and Medicine in October 1983 in regard to the virtual holocaust the Social Security Administration had unleashed against disabled Americans at that time. It was Senator Heinz of Pennsylvania who described that period as a virtual holocaust.

I have also provided you with a copy of a memorandum sent to the judges in the Middle West concerning the public relations disaster at the American Bar Association's annual dinner in honor of the judiciary during the American Bar Association's meeting in August 1986.

A highlight of that dinner was to be the presentation of an award to the Social Security judges for upholding the highest traditions of the American judiciary. The award was to be given to our chief administrative law judge. He did not receive the award because the Social Security Administration first ordered him not to accept the award on behalf of our judges and then later ordered him not to even appear at the dinner. The Social Security Administration evidently was embarrassed that its judges were being honored as judges.

In my statement, I have set out some of the abuses that have beset our judges, including the infamous bait and switch form that the judges in our office refused to mail. The judges in our office had to file a lawsuit in Chicago to have that particular form withdrawn. We filed for a temporary restraining order and the bait and switch letter was withdrawn the day of the hearing.

This judges corps bill makes so much common sense that I have difficulty understanding even the small amount of opposition there is to the bill. Historically, there have been three organizations of administrative law judges and they have all endorsed this bill.

There is the Association of Administrative Law Judges of the Social Security Administration, the Federal Administrative Law Judge Conference, open to membership by all Federal administrative law judges. There is the National Conference of Administrative Law Judges of the American Bar Association, open to State and Federal administrative law judges. As I have said, all of these organizations have endorsed the corps bill.

A fourth judges association has appeared. The Forum of Administrative Law Judges was created to oppose this corps bill. It is open to all Federal administrative law judges except the Social Security judges. We are excluded from membership—a type of judicial apartheid. I understand that approximately 50 percent of their members are from the NLRB.

All the hard evidence is that the judges corps bill will work. It is working in at least 11 States. There is evidence that it has worked on the Federal level. Since 1983, the judges of the Social Security

Administration have served as a minicorps when our caseload was down.

Since 1983, Social Security judges have heard cases from 16 to 18 agencies. After reading some of the opposition arguments against the judges bill from last year, I note that there is a Lazarus-type argument that keeps rising from the dead that expertise would be lost and there would be an increase in cost in hearings.

I believe these arguments are nothing but a smokescreen. Could it be that some Forum members are afraid that in the future they might have to hear an occasional Social Security disability case?

Are there some kinds of hidden perks to be preserved? Is elitism part of the problem? Are they afraid they might have to meet the type of claimant I meet rather frequently who is very poor, may not have had a bath in a week or two, and since he does not have an attorney, I am his attorney? Believe me, when I am his attorney, he has a good one. Perhaps they are just very comfortable with the status quo or they are just plain afraid of change.

Recently, I appeared before the Board of Managers of the Chicago Bar Association, and the president of that association suggested to me that there was a downside on the judges bill that I had not considered.

He suggested that the budget of the Social Security judges was protected because we were under the umbrella budget of the Social Security Administration, and should I not be concerned that as a separate corps standing alone we might not have the proper budget?

I told him that was like telling a Jew in a concentration camp that if he was let out of the camp, he would have to find his own food and lodging. We are perfectly willing to accept that risk.

Incidentally, the Board of Managers of the Chicago Bar Association unanimously voted to support Senate bill 950.

May I answer any questions?

[Submissions of Judge O'Byrne follow:]

TESTIMONY OF

FRANCIS J. O'BYRNE, SR.

Thank you for inviting me to appear and testify. I have been an Officer or Director of the Association of Administrative Law Judges since 1974. It is the organization of the Social Security Judges. In August, I will become the Chair of the National Association of Administrative Law Judges of the American Bar Association. I am currently the Hearing Office Chief Administrative Law Judge of the Chicago-South office, of the Office of Hearing and Appeals, Social Security Administration. I have been with that office since I became an Administrative Law Judge in 1973.

I have been engaged in personal injury, workmen's compensation, and benefit litigation since 1952 as a claims investigator, claims manager, trial attorney, Arbitrator -- Illinois Industrial Commission (Hearings Officer), and an Administrative Law Judge all in Illinois.

I am here on my own time to urge this Subcommittee's approval of S. 950. The bill should be passed because it:

1. **would insulate the Judge from agency pressure;**
2. **would save considerable money;**
3. **would be more efficient than the present system;**
4. **would create the appearance of independence, as well as the reality and, more importantly;**
5. **insure that litigants received a full and fair hearing.**

During the May, 1986 hearing on this Unified Corps a Central Panel of Administrative Law Judges Bill you were made aware of the many organizations that have endorsed the prior Bill S. 673 of the 99th Congress. In part, they were the American Medical Association, the American Association of Retired Persons, the Federal Bar Association, and the National Bar Association. The list is longer this year.

You have heard that the Forum of Administrative Law Judges opposes S. 950. The Forum was organized to oppose this Bill. I am touched by the concern they have expressed for the Social Security Judges. The Forum will not allow any Social Security Judge to join and at the same time have the gall to tell you what is in the best interests of the Social Security Judges.

In various conversations and in reading the 1986 testimony before this Subcommittee, I note one argument against S. 950 that keeps rising from the grave. It is a Lazarus argument as it must be brought back from the dead. I refer to the contention that "expertise" would be lost in a Judges' Corps. It's as if opponents of the Bill had lost the ability to read. The Bill, in rather plain English, provides divisions to insure that "expertise" will not be lost.

In spite of the fact that there have been other strange doings at various agencies, as set out by Judge Litt when he appeared before you, one witness would have you believe that only the Social Security Administration has sinned.

The really strange argument was that a Unified Corps would cost more money than the present fragmented system. That witness saw the 100 plus Social Security Offices located in almost every state as a financial drain. It's the opposite. The facilities are in place now for a Unified Corps of Judges. That witness was also concerned about placing all of the about 200 Washington area Judges in one building. I don't know why that would be necessary, but if it was, the Interstate Commerce Building could hold them. A good number of Judges who had been with the Interstate Commerce Commission are now Social Security Judges.

With a corps of Judges, travel and per diem should be significantly reduced. With Judges living and working in almost every state, travel would be reduced. Social Security Judges have had no problems taking on the Federal Deposit Insurance Corporation, Comptroller of the Currency and Sanction cases under the Medicare program, or any other type of work assigned. Two Judges in my office have done Longshoreman's trial work in the past.

A few years back, there was an Occupational Safety and Health hearings office in Chicago. Three of the four Judges in that office were formerly Social Security Judges. For a period of five or six months, they had little or no work. Our Social Security Hearings Office was three blocks away. We had 2,000 cases pending for seven Judges and there was OSHA with Judges who knew our work with nothing to do. If we had a Unified Corps, those Judges would have been busy.

While the OSHA was in the process of a reduction in force, the Social Security Administration was recruiting Judges.

The caseloads at the various governmental agencies employing Judges will always vary and vary a great deal. It does not make sense for one agency to have Judges with little or nothing to do, while the Judges in another agency are being crushed under a heavy caseload. Common sense and efficiency demand a Unified Corps.

What the public believes to be true is more important than what is true. The public will react to what they believe to be the truth. We all act on what we believe to be true each day. The public still does not understand how I can be an independent Judge and also be employed by a party to the proceeding. That is one reason why the Office of Hearings and Appeals is located in Arlington, Virginia, and not in Baltimore. They pretend that the Office of Hearings and Appeals is independent of and separate from the Social Security Administration. A Unified Corps of Judges would guarantee the reality of independence as well as the appearance.

The present officials of the Social Security Administration and our new Associate Commissioner of the Office of Hearings and Appeals will urge that the following litany of abuse is past history. History repeats itself.

In the past, Social Security Judges were urged:

1. to write shorter decisions so that the clerical staff could type more decisions. The decision was not read, the pages were counted;

2. to reduce the use of expert witnesses to save fees and to speed up the hearings;

3. to issue more denial decisions;

4. to use boiler plate language to speed up the drafting and speed up typing;

5. to reduce the number of medical examinations requested to save fees;

6. to conduct a hearing without receiving a prior closed file or files of the claimant. A prior decision could be res judicata to all issues raised in the pending application or the prior medical reports might with the new medical evidence require that the old file be reopened and benefits awarded;

7. to cite no United States District Court or Circuit Court decisions in our decisions to save the Appeals Council the trouble of looking up the cases cited;

8. to ignore certain Circuit Court decisions;

9. has assigned Judges to frequent travel as punishment for perceived "low production";

10. to engage in "bait and switch" tactics with claimants. A demand was made upon me to send out a form informing claimants that all or part of an alleged overpayment had been waived and therefore the claimant could sign and send back the waiver of hearing attached. Any claimant who did this would have lost any back benefits due, all future benefits, and Medicare coverage. This form was withdrawn after the Judges in our office filed suit in Chicago; and

11. to reduce the amount of prehearing and posthearing medical

> development in order to speed up the hearing process. Pre and Post Hearing development of evidence is essential for a fair hearing and decision. Many of our claimants are so poor they cannot afford medical care or examination.

We are overmanaged, overcontrolled, and overburdened with constant demands for more and more decisions.

Under the umbrella of what the Administration deems "good management", the Judges have lost control of their staff. At present, the Hearings Office Chief Judge (HOCALJ) and the Administrative Law Judges in a Hearings Office do not supervise or issue performance ratings for the support staff. The HOCALJ rates the Hearing Office Supervisor and the Supervising Attorney Advisor. The other Judges in the office do not issue ratings or supervise any of the office staff. The clericals are not really interested in pleasing the Judges; they are interested in pleasing their supervisor. Work is performed with quantity in mind, and quality comes in second.

Our Attorney Advisors must meet a Performance Standard of 1.5 decisions per day in order to get a salary increase. The pressure is on them to produce numbers. The Judges want reasonable quality. We have had attorney advisors inform a Judge that they did not have the time to prepare a decision in the form and style directed by the Judge.

The Hearing Assistants that prepare cases for hearing must set up a certain number of cases each month for hearing. The Judge involved has read the files and may decide that some hearings will require more time. The Judge will ask for fewer hearings than the 35 or 40 demanded of the Hearing Assistant.

The result of all of this is needless tension between the Judges and Attorney Advisors, the Judges and the clerical staff, and the Judges and the Hearing Assistants. In every case, the end result is to pressure the Judges for more and more decisions.

All of the above have a direct bearing on due process and the quality of the decisions issued by the Judges. The Judges are mindful of the pressures on the office staff for "production," and consciously or unconsciously seek shortcuts to assist the staff to meet their Performance Standards.

The present Commissioner of Social Securiy and the present Associate Commissioner will say that most of these abuses were in the past, that the excesses of the past are gone and should be forgotten. The Unified Corps would prevent this cruel history from repeating itself.

I have attached a brief address delivered to the American Society of Law and Medicine on October 25, 1983. The Judges were able to speak out to Congress and the public about the "virtual holocaust" because of the protection of the Administrative Procedures Act and their lifetime tenure.

It is, and has been, obvious that the Social Security Administration has not been happy with its Judges. In 1974 or 1975, they suggested to the House Subcommittee on Social Security that the then backlog of hearings could be ended if the Judges were not under the Administrative Procedures Act. When our title was changed to Administrative Law Judge, officials at the Social Security Administration were disturbed because they were afraid we would really act like Judges. That fear was correct. In August, 1986, the American Bar Association issued an award to the Social Security Judges for upholding the highest traditions of the American Judiciary. In that regard, please see the August 19, 1986 letter attached. Our then Chief Judge was ordered not to appear at the Award Ceremony and not to accept the award. A cheap shot!

In closing, the Judges of the Social Security Administration are eager for the passage of S. 950. Passage of S. 950 would be good for the country. You can understand why we want to escape from the control of the Social Security Administration. Can I answer any questions for you?

Francis J. O'Byrne, Sr.

FRANCIS J. O'BYRNE, SR.

Administrative Law Judge

American Society of Law and Medicine
Ambassador West Hotel, Chicago, Illinois
October 25, 1983

Distinguished guests:

I am not here as a representative of the Social Security Administration; you may assume the Social Security Administration would disagree with much of what I will say today.

The Worker's Compensation case and Social Security Disability case are often related. Frequently the injured worker will have a disability application pending under the Social Security Act while at the same time pursuing his remedy under the Worker's Compensation Act. Issues arising under these laws also converge with respect to the evaluation of disability from the medical point of view as opposed to the legal definitions contained in the respective acts. The definition of disability contained in the Social Security Act is also incorporated in the definition used by a number of insurance companies to define "disability" in non work-related coverage. Therefore, the Administrative Law Judge may decide controversies collateral to the cases which come directly under his jurisdiction. It follows that, for purely pragmatic reasons, the business community, unions and the public at large have a stake in maintaining the integrity of the Social Security system and the independence of the judges who have been charged with the responsibility of applying the Act fairly.

Since 1980 there has been an attack upon the high principles to which Administrative Law Judges have been committed. Perhaps the harshest description is the most eloquent; Senator John Heinz (Republican-Pennsylvania) described the recent program of disability cessation investigation as a "virtual holocaust." Senator William Cohen (Republican-Maine) added his voice terming the procedure "Massive Injustice." On behalf of the American

Psychiatric Association, Dr. James Folsom labeled the undertaking as a "Nightmare." These highly respected individuals were not reserving such rancor for the admonition of some foreign power; sadly, they were describing the actions taken by the Social Security Administration against Americans, against disabled Americans and in particular against those with mental impairments.

To describe the actions taken by the Social Security Administration as a war on the disabled is no mere metaphorical abstraction for: there were deaths. Marlene Maleski, then Acting Regional Commissioner for Social Security in the middle west, reported several suicides among the disabled after they were informed they were no longer eligible for benefits. Suicides were also reported in Michigan, Pennsylvania and California following termination of benefits. Following real threats of physical violence, the disability determination agency in Michigan installed bullet proof glass and obtained an unlisted telephone number. There was also property damage. There were mortgage foreclosures between the date benefits were ceased and the date benefits were restored. The emotional damage done cannot be measured.

As in all wars, propaganda was the instrument of justification. On May 25, 1982, Mr. Paul Simmons, Deputy Commissioner of the Social Security Administration, informed a Senate Subcommittee that the State Agency Determinations were 97.6 percent correct, yet despite the accuracy of such determinations, Administrative Law Judges were "reversing 60 percent of such determinations" in cases reaching them on appeal. Mr. Simmons was and apparently remains oblivious to the absurdity of his contention which has been repudiated by every independent study undertaken. Moreover, he demonstrated an appalling ignorance of the review process in that judges do not "reverse" decisions of the State Agencies in cases under their jurisdiction: such cases are heard de novo. The evidence before the judge is rarely the same evidence upon which the State Agency bases its decision. The use of such accuracy statements in contrasting the role of judges is deceptive at best and calculated bias at worst.

A series of articles by a Journalist named Lambro emerged in 1980 documenting a meeting held by individuals bent on putting in place certain changes in the Social Security Disability Review program which aimed at drastic curtailment of the decisional independence of the judges. The judges' independence is guaranteed by the Administrative Procedures Act (APA). Their report focused upon means by which the protection afforded claimants under the Administrative Procedures Act could be undermined. The planned attack was on several fronts as revealed by subsequent events, all aimed at that objective. Some examples follow: (1) Proposals to tighten long-standing provisions of the Social Security Act. (2) Proposal to amend regulations so as to adversely impact upon the Administrative Law Judge's ability to apply the spirit of the Social Security Act in terms of long-standing precedent. (3) To narrow the definition of disability by interpretation. (4) To grossly narrow the disability standards used by State Agencies and to enforce those standards by review of State Agency decisions under the guise of "quality control". (5) Create a methodology whereby decisions of the United States District Courts could be frustrated when such decisions were deemed incorrect in the interpretation of both the Social Security Act and the regulations, and finally a concerted effort to implement all of the foregoing at every level of the adjudication process without regard to the possible adverse impact on fairness or hardship to the citizens seeking benefits or receiving benefits.

The Administrative Procedures Act (APA) exempts regulations relating to benefits from its notice and comment requirement. In 1970 the new Department of Health and Human Services (DHHS) waived that exemption and agreed to be bound by the notice and comment procedure because the public had a right to know. Since 1970 all proposed regulations were published in the Federal Register.

This year the Department of Health and Human Services of which the Social Security Administration is a part expressed the desire to return to the old days of regulation making by decree and without notice and comment. An immediate Congressional and a public outcry ended that proposal. But for this outcry, the Social Security Administration could have surreptitiously issued regulations affecting every American's rights under the Act. The regulations have the affect of law and are binding on the Administrative Law Judges.

The Social Security Administration decided it would not attempt any significant changes in the disability determination process under the bright light of notice and comment. Since they could not work in total darkness, they chose the twilight zone of the Social Security Rulings issued by the Commissioner of Social Security. These rulings are not subject to notice and comment and until recently contained rulings on unusual fact situations or on cases of general interest. By and large, they were reasonable interpretations of the law and regulations. Although they are not the law, the rulings bind the Administrative Law Judge. After a ruling is issued, the Administrative Law Judge is bound and must comply with the provisions of the ruling.

The Social Security Administration had found a way to restrict the awarding of benefits to claimants without going to Congress and without notice and comment. Social Security Rulings were issued stating that certain physical impairments were "not severe." Under the regulations if an impairment is "not severe" the case is ended. Nothing further can be considered and the claim is denied.

I believe this is a blatant attempt to evade the requirements of the Administrative Procedures Act. The Congress is aware of this tactic and corrective legislation is pending. The Administrative Law Judges anticipate class actions to challenge this procedure and that thousands of cases will have to be reopened. We fear a terrible strain will be placed upon the entire system and substantial needless cost will be incurred.

A multiple attack was mounted against the Administrative Law Judges. The Appeals Council remanded allowance cases for further hearing and a new decision because the Administrative Law Judge had given too much weight to a claimant's complaints of pain. The Administrative Law Judge had seen and heard the claimant. The Appeals Concil had not. Allowance cases were remanded because the Administrative Law Judge gave too much weight to the testimony of an expert witness. I have never heard of a denial case being remanded because the Administrative Law Judge found that a claimant's complaints of severe and chronic pain were not credible.

Certain Administrative Law Judges were put on Bellmon review. One hundred percent of their decisions were reviewed for error before payment was authorized. The Administrative Law Judges involved were advised they were under review. At the outset, only those Administrative Law Judges with allowance rates over the national average were targeted. The obvious intent was to chill the allowance rate of those Administrative Law Judges.

Newly appointed Administrative Law Judges attend training classes to study the procedures, the Act, and the Regulations involved in their future work. My training sessions in 1973 were very useful and no attempt was made to brainwash the new Administrative Law Judges. However, in a recent class a speaker informed the new Administrative Law Judges that the State Agency denial determinations were 95 percent correct as established by a Social Security Administration study. These new judges would be hearing appeals from the State Agencies.

The Administration even became petty. The clericals in our headquarters were advised not to address us as "Judge."

A recent survey of Administrative Law Judges revealed that 70 percent of the Administrative Law Judges felt pressure to deny claims. Because of the actions of the Social Security Administration, the Association of Administrative Law Judges retained the services of Elliott Richardson, the former Secretary of the Department of Health and Human Services. At present, the Association suit against the Social Security Administration is pending in Washington, D.C.

The Social Security Administration line on all of this is that Congress made them do it. This is a half truth. Congress did legislate the review of judge's decisions and did legislate the review of the disability rolls, but in a recent Subcommittee Report, the Senators stated that the Administration did not comply with the intent of the legislation.

The State Agencies did not escape the attention of the Social Security Administration. Their caseloads doubled and they were required to deny benefits or cease benefits on what had been routine pay cases in the past. The standards by which they were to determine disability were made more stringent. For a time, the State Agencies followed the new directives, even though they knew they were not reasonable or even unjust.

Then came the Mutiny. As of October 13, 1983, Alabama, Arkansas, Georgia, Kansas, Maine, Maryland, New Jersey, New York, North Carolina, Oklahoma, Pennsylvania, and Virginia have ceased to remove individuals from the disability rolls. In the field of Federal-State cooperation, this is an incredible development.

In regard to the problem of what to do about decisions of the United States District Courts that the Administration deemed to be incorrect, a simple solution was found. The individual claimant involved was paid benefits and the decision was not appealed. Then the Administration in the Social Security Rulings announced its policy of non-acquiescence in regard to that decision. The Administration announced it would not obey that decision in that Circuit and the Administrative Law Judges were told not to follow the law as interpreted in that case. Stare Decises was out the window. This was the Finnegan vs. Matthews case in the Ninth Circuit.

The Administrative Law Judges were stunned by the arrogance of this policy and we expected dire consequences for the Social Security hearing system. In that this was a Social Security ruling, the Administrative Law Judges were to obey and ignore the court. The consequences were soon to arrive.

In a later case a court spoke to this non-acquiescence policy. I quote:

"For the Secretary to make the general assertions that a decision of the court of appeals is not to be followed because she disagrees with it is outside the law."

The court went on to certify a Ninth Circuit class of claimants whose benefits were ceased because the Social Security Administration refused to follow the decisions in the *Finnegan* and also the *Patti* cases. It is estimated that 72,000 cases will have to be reopened and reviewed by the Administration.

Non-acquiescence has proved to be costly. Not only will all these cases be reopened at great cost, but attorneys' fees will add to the cost. In the *Siedlecke* case the attorney was awarded $45,000 in fees under the Equal Access to Justice Act.

On the west coast, the Administration tried to avoid the law. In the middle west, the Administration sought to evade the requirements of the Administrative Procedures Act, the Social Security Act, the Social Security Regulations, and the requirements of case law in eagerness to save disability dollars. The states were to find that certain claimants under 50 were capable of working if they did not meet the Listings and therefore deny the claim.

All of this was documented by the decision of Judge Larson of the United States District Court in Minneapolis in the case of *Mental Health Association, et. al. vs. Schweiker*. The decision was issued in December of 1982. This was a class action involving all mentally impaired claimants who were denied benefits or had their benefits ceased on and after March 1, 1981 in the states of Illinois, Indiana, Michigan, Minnesota, Ohio and Wisconsin.

Judge Larson found that these claimants were denied or ceased because of a policy change issued to the states by the Social Security Administration. The Judge found that the policy change violated the Social Security Act, violated the Social Security Regulations, violated the notice and comment provisions of the Administrative Procedures Act, and violated the requirements of case law. He also found that the policy change was arbitrary, capricious, irrational, an abuse of discretion, and lacked any rational or colorable basis.

This policy change issued to the states was never communicated to the Administrative Law Judges. We first learned of it when we read the decision. Some months before Judge Larson's decision, I testified before a Senate Subcommittee. In regard to the cessation caes coming before me, I told the Senators that in many cases I did not understand how any reasonable person following the Act and the Regulations could have found that a claimant's disability had ceased. After I read Judge Larson's opinions, I understood.

During the MacNeil Lehrer Report of February 14, 1983 on the topic of "Cutting Disability-Is It Fair?" Mr. Paul Simmons was asked a question about what standards the Social Security Administration was using to cut the disability rolls. His answer, in part, was

> "... we have not changed any standards since we have taken office except those that move along with medical technology."

Based upon Judge's Larson's opinion, it would appear that Mr. Simmons was not correct about not changing standards. Whatever the change is called, the result is the same. The Minnesota Mental Health case has established that people can be cut from the rolls by a directive from the Administration to the states without notice to the public.

The methods used by the Administration were effective. The General Accounting Office reported that 748,000 cases were reviewed from March, 1981 to February 25, 1983 and that benefits were ceased for 45 percent of that number. Of that total, 74,800 were mental cases and 42 percent of them were removed. Of all cases appealed to an Administrative Law Judge, 60 percent were restored to benefits status. However, in the cases involving the mentally impaired, 91 percent were returned to benefit status. That is why Senator Heinz said the continuing disability investigations program of the Social Security Administration was a "virtual holocaust."

After every war comes a peace. Peace is coming back to the Social Security Administration. Peace is coming because the Congress and the courts are moving to stop the managerial madness described. Senator Heflin has introduced Senate Bill 1275 to establish a unified corps of Administrative Law Judges. This concept would forever free the Administrative Law Judges from agency pressures. This bill is worthy of your support.

In particular, peace is coming because we have a new Secretary of the Department of Health and Human Services and a new acting Commissioner of Social Security. These two remarkable women, the Honorable Margaret Heckler and the Honorable Martha McSteen will first have to clear the wreckage left by the former tenants. Then they will return the Social Security Administration to its former positions as the most decent, humane, and efficient organization in government.

Thank you.

Judge Francis J. O'Byrne
Kluczynski Federal Bldg.
Suite 2645
230 S. Dearborn
Chicago, IL 60604

August 19, 1986

TO: All Administrative Law Judges, Region V
FROM: Judge Francis J. O'Byrne, Chicago (South)
RE: AWARD TO ALJs OF SSA AT ABA CONVENTION, NEW YORK, 8/86!
(please copy to all ALJs in your office)

When the prophet Jeremiah (Jer.37:12-21) spoke the truth the princes were enraged and complained to King Sedecia. Jeremiah was cast into a vaulted dungeon (on a daily piece of bread) and was later thrown into a cistern where there was no water but mire; so Jeremiah sunk in the mire.

Our Chief Judge Rosenthal has not as yet been thrown into a cistern by the princes of SSA, nor have they intended that he die of starvation of the body although they did deny him a dinner. A nameless prince of SSA ordered that he not attend the annual Dinner in Honor of the Judiciary in August, 1986, at the ABA Annual Meeting in New York.

The ABA had announced that it was going to cite the Judges of the Office of Hearings and Appeals for upholding the highest traditions of the judiciary at it Annual Meeting. By imputation, the entire Administrative Judiciary of the United States was also honored.

I had thought that the SSA, although not altogether pleased by the honoring of its Judges, would be discreet enough to keep a low profile. I was wrong. It chose to interfere.

The ABA naturally intended to deliver the citation to our CALJ, Paul Rosenthal. He was to be accompanied on the dais by JJ. Charles Bono, Robert Cox (president of the Assn. of ALJs in HHS), and Jean Greene, Chair of the National Conference of ALJs of the ABA.

The award ceremony took place at the Annual Dinner in Honor of the Judiciary, the prime social event and gathering for all Judges attending the Meeting. This was significant for the Judges of OHA. Awards have never before been part of this formal banquet. By making the presentation at this time, the ABA was stressing its importance, highlighting its praise, and broadcasting its significance most widely to members of the Bench at all levels.

Judge Rosenthal was present at the Annual Meeting and attended the meetings of the National Conference of ALJs. BUT he neither received the award nor did he attend the banquet.

This remarkable banning of Judge Rosenthal did not sit well with the ABA officials. The event became another public-relations disaster of some SSA bureaucrat(s), the same who have the inclination to control OHA ALJs and to make themselves look foolish. How well they chose the setting to flaunt their pettiness! They paraded it before Justices of the U.S. Supreme Court, Circuit and District Court Judges as well as State Judges of all levels and members of the Bar from all over the U.S. and the world.

Judge Leonard (Regional Chief ALJ, Region II) was designated by OHA to receive the award in the place of Judge Rosenthal. ABA officials correctly identified this as an attempt to downplay the importance of the award and refused. They were stunned to learn that Cheif Judge Rosenthal had been ordered not to accept their award and truly grieved that he had been ordered to snub the Banquet. I do not know who issued the order, but understand they came from outside the OHA.

It was an emotional event for me so I do not recall the entire speech that accompanied the award. The ABA President did state that, while there had been lingering doubts as to whether Administrative Law Judges were truly independent of their agencies, or even really judges, the Judges of the OHA had established that they are independent, are Judges, and had acted in the finest traditions of the Judiciary.

JJ Bono, Cox, Greene and Leonard were called forward. The award was then presented to Judge Cox as President of our Association and as representative of all the OHA judges, further indication of ABA's anger over Judge Rosenthal's banning.

Postprandially, one ABA official assured me that they had nothing against Judge Leonard, but simply did not know him and hoped that his feelings were not hurt. However, under the circumstances, the ABA could and would not condone SSA's action in preventing its Chief Judge from accepting the award and denying him the right to appear at the dinner. The ABA has since decided to send a duplicate of the plaque to Judge Rosenthal to be exhibited in the Chief ALJ's office.

This incident must increase our determination to free ourselves from the shackles of the SSA. The Unified Corps of Administrative Law Judges will best serve the people we serve and allow us to be Judges and not mere lackeys. Another possibility would be a Review Commission separated from the SSA.

The continuing bureaucratic smallmindedness by the princes of SSA, set in bold relief by their coarse treatment of that good and decent man, Judge Rosenthal, clamors for redress. He deserves better, the public deserves better, and we deserve better.

Francis J. O'Byrne

Francis J. O'Byrne
HOCALJ, Chicago (South)
Chairman-Elect, National
Conference of ALJs, ABA
Director Region V, Assn.
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July 22, 1987

Senator Howell Heflin
Chairman Subcommitte on Courts
and Administrative Practice
Senate Judiciary Committee
223 Hart Senate Building
Washington, D. C. 20510

Re: S.950 Hearing on
July 21, 1987

Dear Senator:

After the hearing of July 21, 1987 Judge Davidson (NLRB) and I had a brief conversation. He urged that I had been unfair to the NLRB judges in my oral presentation, that I had stated that the NLRB judges did not want to hear cases involving the poor.

On the flight home, I checked my notes and find I had written "could it be that some Forum members are afraid that in the future they might have to hear an occasional disability case involving the very poor who so often appear before me?" Based upon Judge Davidson's comments, I may have included all NLRB or all Forum judges. When I receive the transcript, I will make any necessary corrections.

I bring this to your attention now in the interest of fairness.

Respectfully,

Francis J O'Byrne

Francis J. O'Byrne

cc: Senators: Metzenbaum, De Concini
Grassley, and Thurmond
David Davidson, ALJ, NLRB

Senator HEFLIN. Thank you.

We are delighted that Senator Grassley has joined us. He has an opening statement to be made part of the record.

[The prepared statement of Senator Grassley follows:]

PREPARED STATEMENT OF HON. CHARLES E. GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA

Today's hearings mark the third successive Congress in which we have taken testimony on this proposal, which would create an independent corps of administrative law judges.

As a farmer, I know the futility of "Plowing the same Ground" more than once. So while I commend Chairman Heflin for his tenacity on this issue, I still have many reservations about this proposal.

I can summarize them to include the following:

(1) The case has never been made for the kind of systemwide unfairness or lack of public confidence to justify a complete reorganization of administrative law judges. To the extent that problems of this sort exist in relation to particular agencies, they should be addressed through problem-specific legislation.

(2) The proponents of this bill have never demonstrated the cost savings and economies of scale that would result from an ALJ corps on the Federal level. It's clear that, in these times of reduced Government spending, we can't afford to create new, inefficient, Federal schemes.

(3) The proponents of this bill continue to underestimate the resulting reduction in agency expertise. Not all judges are created "equally", particularly with respect to courts created by Congress under authority of article I. Congress appreciates the "expertise argument"—witness the creation of the Tax Court, the Claims Court, the Court of International Trade, and the U.S. Court of Military Appeals—even if the proponents of this bill do not.

(4) It is useful to remember that agencies, not ALJ's, make agency policy. Under our Federal system, administrative law judges are fully subject to the agency head's decisions on matters of law and policy. The Administrative Procedure Act explicitly vests authority over the final decision in particular cases with the agency head. This is as it must be if we are to have a unified agency policy accountable to the Congress, which created the agency, and to the public. I cannot support a proposal which would increase the de facto policymaking role of those who are insulated, and thus not accountable.

Mr. Chairman, perhaps these concerns can never be fully addressed. But I stand ready to work with you and the committee to try to reconcile these important issues.

Senator HEFLIN. I will probably submit some questions in writing in order to shorten the time.

Senator Grassley, do you have some questions?

Senator GRASSLEY. Well, I can also submit some of my questions in writing, but I do have a few. I would like to ask Mr. O'Byrne the fact that he mentioned that organizations that support the corps bill—does the American Bar Association support the bill?

Judge O'BYRNE. That is a very good question, Senator, and I thought it might be asked. The American Bar Association formally has not been asked to endorse the bill. As far as I know, the Litigation Division, Torts Insurance, the National Conference of ALJ's and a couple others all have endorsed the bill.

The Administrative Law Section is still talking about the bill; the professors are rather slow. I believe the labor group at the American Bar Association has expressed no interest in the bill and perhaps opposition to the bill.

Incidentally, the labor group at the American Bar Association has never allowed us to present our side of the case. The labor group at the American Bar has heard about this bill through the NLRB, the judges before whom they appear. I think that if we could meet with them and talk with them, we might be able to swing them around, but they will not talk to us.

Senator GRASSLEY. You give shortshrift to the argument of whether expertise is important. I have a question along that line. In your testimony you described a situation in Chicago where there were underutilized OSHA judges at the same time that there were overworked Social Security judges.

You stated with the ALJ corps in effect, all judges would be equally busy. Now, my question is, under S. 950, it seems to me that these agencies would be assigned to different divisions. OSHA judges would seem to fit into Division 2 and Social Security judges into Division 5.

It does not appear to me, then, that they would be permitted to share the caseload. Now, is this the way it appears to you in the bill or am I incorrect?

Judge O'BYRNE. No, it does not appear that way to me in the bill. It appears to me in the bill that any time there would be a shortage in one area, if there are judges in another group they simply move them over.

Senator GRASSLEY. Well, is it your understanding that judges can shift divisions so that a Labor Relations judge can hear black lung cases and an OSHA judge can hear Social Security cases?

Judge O'BYRNE. Yes, for example, if we had the unified corps bill tomorrow. I would not want to be placed in the position of hearing a complicated SEC matter or a FERC matter. That would be absolutely ridiculous.

Let me work half days on Social Security cases and half days with those people for 5 or 6 months and I will take on any case they have.

Senator GRASSLEY. OK. Well, it seems to me like what you just said, then, would support the critics of S. 950's position, who say that agency expertise will suffer under the corps concept, and you are at least saying it is going to suffer for a few years while——

Judge O'BYRNE. No. I disagree with that absolutely. If this bill was passed tomorrow, I do not think there would be very much change maybe for 2, 3 years. The blending would be accomplished slowly.

As a matter of fact, since some Forum judges do not like Social Security or Black Lung cases, it might be a good idea to break them into those cases slowly.

Senator GRASSLEY. Mr. Chairman, I will submit the questions I had for Ms. Barlow in writing.

Senator HEFLIN. Senator Thurmond.

Senator THURMOND. Mr. Chairman, I can submit questions at the same time.

Senator HEFLIN. Let me ask Ms. Barlow a question about the expertise. The bill has, I believe, seven divisions, which is an attempt to group expertise into a division. For example, you have got the Division of Securities, Commodities and Trade Regulations, which deals, for example, with the Department of Agriculture, Commodity Futures Trading Commission, Securities and Exchange Commission, Federal Trade Commission, International Trade Commission. They are grouped together.

In other words, there would have to be a radical situation to move an administrative law judge from Social Security into that division. The fact that they would be in that division means that they could interchange and try those cases which have a great deal of similarity in regard to the area that they would have inquiries about.

Is that a correct evaluation?

Judge BARLOW. I believe so, Senator. It seems to me from reading the bill and from being involved somewhat in the changes that were made in the current edition that the object is to allow the chief judge of each division to assign cases based on expertise, and that the chief judge assigns cases to a division based on the issue of expertise.

But there is one thing that should be pointed out that has been pointed out in my written statement and pointed out by me orally on a previous occasion here, and that is that within the Social Security Administration, while we have approximately 690-some judges who deal only with Social Security, a large percentage of our judges come from within government in the office of counsel to the various agencies and have been judges in other agencies.

For example, I work with a judge in my hearing office who has served both in the Coast Guard and in OSHA. There is no doubt in my mind that Judge O'Connell could be called upon at any time to hear an OSHA case or a Coast Guard case. He has been an administrative law judge for over 15 years.

Colleagues of mine who came into the program with me served in the NLRB as counsel, have served in the ICC as counsel. At the same time or approximately the same time as I joined SSA, I believe seven ICC judges were transferred when ICC closed its ALJ branch, and those ICC judges now sit in Social Security. They are available to hear ICC cases.

The fact that we have been judges hearing only these types of cases does not preclude our expertise in other areas. The former hearing office chief judge in my office was an SEC litigator for years and years and years before he became an ALJ.

We cannot discount the backgrounds of our judges. We must rely on the bill, on its breakdown and the way of assigning cases according to expertise. I think the protections are there.

Thank you, Mr. Heflin.

[Questions and answers of panel, subsequently received for the record, follow:]

QUESTIONS OF SENATOR HEFLIN FOR JUDGE BALOUN

IN TESTIMONY RECEIVED HERE TODAY IT HAS BEEN STATED THAT THE HEALTH CARE FINANCING ADMINISTRATION ASSUMES RESPONSIBILITY FOR MEDICARE PART B APPEALS ON OCTOBER 1, 1987, AND PART A IN 1988. WHAT IMPACT, IF ANY, WILL THIS HAVE ON SOCIAL SECURITY ADMINISTRATIVE LAW JUDGES?

QUESTION

THE ADMINISTRATION IN THE PAST HAS ADVOCATED THE CREATION OF AN ARTICLE I COURT TO HEAR SOCIAL SECURITY CASES. IS THIS THE PROPER RESPONSE TO THE PROBLEMS CURRENTLY BEING FACED BY SOCIAL SECURITY CLAIMANTS?

FURTHER ANSWERS TO SENATOR HEFLIN'S QUESTIONS BY JUDGE BALOUN, PRESIDENT, ASSOCIATION OF ADMINISTRATIVE LAW JUDGES. (ASSOCIATION'S ANSWERS ARE REPORTED BY LETTER OF JUDGE JOYCE KRUTICK BARLOW, DATED AUGUST 26, 1987.)

QUESTION NO. 1:

THE MEDICAL AND HEALTH PROFESSIONALS ARE EXTREMELY CONCERNED THAT BOTH PART B AND PART A MEDICARE APPEALS WILL BE HEARD BY A SPECIAL MINI-CORPS OF JUDGES WITHIN HCFA. THEIR CONCERN LIES WITH THE IMPARTIAL DECISION-MAKER I.E. A DENIAL OF PROCEDURAL AS WELL AS SUBSTANTIVE DUE PROCESS AND AN EXTENSION OF AGENCY POLICY. FURTHER, THEY ARE CONCERNED, AND RIGHTFULLY SO, OF HIERARCHICAL CONTROL AND PROGRAM IMPLEMENTATION (AS OPPOSED TO CONFLICT RESOLUTION).

IF THE CURRENT PLANS FOR PROCESSING BOTH PART B AND PART A CASES ARE ALLOWED TO PROCEED, THE SOCIAL SECURITY JUDGES ASSIGNED TO THE OFFICE OF HEARINGS AND APPEALS WILL BE OUT OF THE PICTURE. I SHOULD NOTE THAT AN OVERSIGHT HEARING WILL BE HELD ON SEPTEMBER 30, 1987 BY THE SUBCOMMITTEE ON ADMINISTRATIVE LAW AND GOVERNMENTAL RELATIONS. THE HOUSE JUDICIARY COMMITTEE APPARENTLY IS CONCERNED WITH NOT ONLY THE RECRUITMENT OF THESE SPECIAL MINI-CORPS JUDGES, BUT THE APPEALS BOARD TO HANDLE BENEFICIARY, PROVIDER AND AGENCY APPEALS OF THEIR JUDGE'S DECISIONS.

QUESTION NO. 2:

JUDGE O'BYRNE, IN RESPONSE TO THIS QUESTION, NOTED H.R. 4647 AS BEING A "DISASTER". THE ASSOCIATION COULD NOT MORE FULLY AGREE; HOWEVER, MR. ARCHER INTRODUCED A BILL, H.R. 2117, ON APRIL 22, 1987, WHICH WOULD (UNDER TITLE II), ESTABLISH A SOCIAL SECURITY COURT, AND CALL FOR ABOLITION OF THE APPEALS COUNCIL. THIS BILL HAS MERIT FOR SEVERAL REASONS. FIRST, THE APPEALS COUNCIL, ITSELF, WOULD NO LONGER EXIST AS A POLICY ARM OF THE SECRETARY. SECOND, THE FINAL ADMINISTRATIVE LAW JUDGE DECISION WOULD BE APPEALABLE TO THE NEWLY CREATED COURT.

THE APA HEARING BY ADMINISTRATIVE LAW JUDGES IS PRESERVED UNDER THIS BILL AND WOULD DOVETAIL WITH THE CORPS BILL. THIRD, THERE WOULD BE ONE UNIFORM BODY OF SOCIAL SECURITY LAW APPLICABLE THROUGHOUT THE 50 STATES. FOURTH, THE UNITED STATES DISTRICT COURTS WOULD BE RELIEVED OF THEIR EVER-INCREASING CASE LOAD BURDEN.

THE ASSOCIATION HAS NOT, AS YET, BEEN ASKED TO COMMENT ON THIS PARTICULAR BILL, BUT WILL DO SO IF REQUESTED.

QUESTIONS OF SENATOR GRASSLEY FOR JUDGE BALOUN

1. Can you provide the committee with any insight as to why the American Bar Association and its Administrative Law Section, the District of Columbia Bar Association and the Administrative Conference of the United States have declined to support legislation such as S. 950?

2. At our July 21 hearing, I inquired as to the interaction of S. 950, as proposed, and S. 558 (the "Fair Housing" bill). I would like to put a series of questions to you, as President of the Association of Administrative Law Judges.

a. Does the Association have any view on the role S. 558 contemplates for ALJ's? If not, why not?

b. Are you aware of any other statute that (like the proposed Fair Housing bill) permits an ALJ to make a punitive damage award?

c. The Fair Housing bill would make HUD administrative law judges' decisions on housing discrimination the final agency action. This appears to be a substantial departure from current APA practice, which makes ALJ decisions "recommendations" subject to agency review. Can you tell me what other statutes currently make the ALJ's decision the "final agency action" under the APA?

d. The Council of ALJ's in S. 950 is authorized to appoint additional ALJ's. In the case of another statute creating new or expanded causes of action (such as the Fair Housing Bill), how might the Council estimate the numbers of additional ALJ's needed for the Department of Housing and Urban Development?

JUDGE BALOUN'S RESPONSES TO QUESTIONS OF SENATOR GRASSLEY:

1. ALTHOUGH I AM NOT A MEMBER OF THE AMERICAN BAR ASSOCIATION, I HAVE BEEN INFORMED THAT THE ADMINISTRATIVE LAW SECTION APPOINTED AN AD HOC COMMITTEE TO STUDY THE ADMINISTRATIVE LAW JUDGE CORPS CONCEPT, IN PRINCIPLE SUPPORTED THE CONCEPT, AND DESIGNATED THE SECTION COUNCIL TO WORK WITH THE JUDICIAL ADMINISTRATION AND OTHER COMPONENTS OF THE AMERICAN BAR ASSOCIATION IN REGARD TO THE STRUCTURE, THE DRAFTING, AND LEGISLATION.

   AT THE SPRING 1985 MEETING, THE SECTION RESOLVED THAT THE CORPS CONCEPT HAD MERIT, AND SUPPORTED THE CREATION OF A SMALL EXPERIMENTAL ADMINISTRATIVE LAW JUDGE CORPS CONSISTING OF ADMINISTRATIVE LAW JUDGES FROM THE SMALL AGENCIES AND OF AGENCIES WITHOUT ADMINISTRATIVE LAW JUDGES.

   I AM UNAWARE OF ANY OTHER ACTION BY THIS BODY.

   TO MY KNOWLEDGE, THE DISTRICT OF COLUMBIA BAR ASSOCIATION HAS NOT CONSIDERED THE CORPS BILL. THE ONLY BAR ASSOCIATION I KNOW TO BE ACTIVE IN THE DISTRICT OF COLUMBIA, THE FEDERAL BAR ASSOCIATION, HAS SUPPORTED THE ADMINISTRATIVE LAW JUDGE CORPS BILL.

   THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES HAS NOT TAKEN A POSITION IN REGARD TO THE CORPS BILL.

2. A. SEE ATTACHED LETTERS OF MAY 11 AND JULY 2 TO SENATOR METZENBAUM RE: S.558.

2. B. UNDER THE LONGSHOREMEN'S AND HARBOR WORKER'S COMPENSATION ACT, 33 U.S.C. 901 ET. SEQ., EMPLOYERS THAT UNREASONABLY REFUSE TO PAY PREVIOUSLY AWARDED WORKERS COMPENSATION PAYMENTS CAN BE ORDERED BY AN ADMINISTRATIVE LAW JUDGE TO PAY A PENALTY OF 20% OF THE AMOUNT DUE. 33 U.S.C. 914(E) AND (F). CLEARLY, THE AMOUNT OF THE PENALTY IS A FORM OF PUNITIVE DAMAGES DESIGNED TO DETER EMPLOYERS FROM WRONGFUL REFUSALS TO PAY INJURED WORKERS. THIS STATUTE APPLIES NOT ONLY TO LHWCA CASES, BUT ALSO TO CASES OF THE ALSO COVERS, THROUGH "LONGSHORE EXTENSIONS," INJURIES TO THE MILITARY'S CIVILIAN EMPLOYEES AND DISTRICT OF COLUMBIA WORKER'S COMPENSATION CASES FOR INJURIES SUSTAINED BEFORE JULY 26, 1982.

   LHWCA'S ADMINISTRATIVE HEARINGS WITHSTOOD A CONSTITUTIONAL ATTACK ON 7TH AMENDMENT GROUNDS IN CROWELL V. BENSON, 285 U.S. 22 (1932), THE LEAD CASE UPHOLDING ALJ HEARINGS FROM SUCH CONSTITUTIONAL CHALLENGES, but that decision was narrowly grounded in Admiralty jurisdiction. 285 U.S. at 45. Since that time the courts have clarified that ALJ hearings do not violate the 7th Amendment right to jury trial in cases such as *Tull v. United States*, 107 S.Ct. 1831, 1835n.4 (1987) and *Atlas Roofing Co. v. Occupational Safety and Health Review Commission*, 430 U.S. 442, 454 (1977). No court has ever ruled that the 20 % penalty's use in Longshore extensions is unconstitutional, and the Longshore extensions have been in effect for 59 years -- since the District of Columbia Worker's Compensation Act of 1928. Therefore Congress can legislate with confidence knowing that there is no constitutional infirmity in punitive damage jurisdiction for ALJ's decidng Fair Housing cases. *See* Statement of Prof. Arthur Wolf Before the Senate Judiciary Subcommittee on the Constitution at 13-16, and attached Appendix A, listing states with punitive damages in Fair Housing cases under state law.

2. c. Decisions of ALJ's on discrimination actions brought pursuant to the new Immigration Reform legislation are final actions directly appealable to the Court of Appeals.

2. d. We would expect that the Council would call upon HUD's nearly 20 years of experience with Fair Housing, and on a diverse group of experts in the fields of anti-discrimination litigation and court administration to devise a preliminary estimate of the first year's expected caseloads and workloads, taking into consideration the expected nature and complexity of cases brought and the estimated ALJ and law clerk orientation time spent acquiring substantive expertise. We would expect that the Council would then provide temporary ALJ services to satisfy statutory adjudication deadlines or time limits accordingly. Based on the experience of the Council and HUD, and on further consultations, the Council might be expected to revise its caseload and workload forecasts continually to assure that there are enough judges to handle the caseload under the Fair Housing Amendments Act of 1987. If additional ALJ's are needed, they could be hired in light of actual and projected caseloads and workloads determined by the Council after consultations described above.

ASSOCIATION OF ADMINISTRATIVE LAW JUDGES, INC.

LEONARD E. BALOUN
PRESIDENT

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May 11, 1987

Senator Howard M. Metzenbaum
United States Senate
Washington, D.C. 20510

Re: Fair Housing Amendments Act of 1987

Dear Senator Metzenbaum:

You have asked for my response to portions of the testimony before the Senate Judiciary Committee's Subcommittee on the Constitution April 7, 1987 by Assistant Attorney General William Bradford Reynolds of the Civil Rights Division. In testimony before the House Judiciary Committee's Subcommittee on Civil and Constitutional Rights May 7, 1987, Mr. Reynolds amplified these remarks. In his testimony, Mr. Reynolds has opposed the use of administrative law judges (ALJs) to hear housing discrimination complaints under the proposed Fair Housing Amendments Act of 1987, based upon (1) statistical comparison of adjudication times for Article III judges versus administrative law judges; (2) the impression that Article III courts handle cases faster and cheaper than administrative law judges; (3) the belief that alternative dispute resolution would be better; (4) the belief that the Administrative Conference of the United States would support arbitration of civil rights cases; (5) the belief that in 1978 legislation amending the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), Congress replaced administrative law judges with arbitrators; and (6) the belief that only Article III judges -- having lifetime tenure and being governed by the Federal Rules of Evidence and Federal Rules of Civil Procedure -- could fairly adjudicate Fair Housing cases. The facts do not support these views.

Evaluation of data on court disposition times as well as Reynolds' prepared statement and his answers to questions lead me to conclude that administrative law judges would process Fair Housing complaints faster than Article III judges -- and certainly far more fairly and expeditiously than could be anticipated with alternative dispute resolution.

First, his testimony utilizes administrative law judge statistics relating to only two types of cases (Senate Statement at 3): compensation cases before the Department of Labor (Black Lung claims) and Social Security Administration; and unfair labor practice complaints before the National Labor Relations Board and Federal Labor Relations Authority. These two types of cases involve complex law and facts. DOL and SSA compensation cases normally involve complicated expert medical testimony; NLRB and FLRA cases involve multiple witnesses to alleged unfair labor practices.

In sharp and marked contrast, HUD administrative law judges who handle discrimination cases would need expert testimony, if at all, only in pattern and practice cases. What Mr. Reynolds terms the "garden variety" of Fair Housing cases will require only a determination of whether a particular landlord or real estate agent discriminated against a particular home buyer or renter. One would expect HUD judges to easily and expeditiously resolve conflicting testimony by laymen in such cases.

The proposed Fair Housing Amendments Act of 1987 includes strict deadlines on HUD investigation of discrimination complaints and HUD administrative law judge adjudication of the complaints. No such legislative deadlines govern the complex compensation and unfair labor practice cases to which Mr. Reynolds' administrative law judge statistics relate.

Second, one cannot reasonably use a few "survey" statistics -- the source and basis of those in the testimony is not disclosed -- to argue that HUD judges would not resolve Fair Housing Act cases expeditiously. The facts are to the contrary. The latest available published data on ALJ hearings shows swift adjudication of discrimination claims. See Federal Administrative Law Judge Hearings, Statistical Report for 1976-1978, Administrative Conference of the United States (1980); Id, Statstical Report for 1975. (Hereafter, FALJHSR). The reports show:

1. For 1976-1978 Equal Opportunity complaints alleging discrimination by HUD fund recipients, where judges held hearings on the merits, HUD averaged only 272 days from the date cases were referred to its administrative law judges to the date of the judge's Decision and Order. In cases where no hearing on the merits was held, the average was 146 days. Post-hearing agency review procedures from the date of the Decision and Order to the date of the final agency action averaged only 55.3 days in cases where hearings were held on the merits, and averaged zero days in all other cases. Total time from the date of the private complaint or Departmental or agency action, including agency review, averaged 232.7 days; cases not involving agency review averaged 103 days. (ACUS FALJHSR 1976-78 at 176).

2. For 1976-1978 HUD contract debarment and suspension cases where HUD judge hearings were held on the merits, HUD averaged only 148 days from referral to Decision and Order; all other debarment and suspension cases averaged 140.6 days. (Id. at 174).

Mr. Reynolds' testimony simply ignores HUD's excellent record of promptly deciding cases similar to Fair Housing cases. Compensation and unfair labor practices case statistics are not "representative," as the testimony claimed (Senate and House Statements at 3), of how Article II judge decision--making will work in HUD Fair Housing cases. Compensation and unfair labor practices cases are not comparable to Fair Housing Act cases; they are no indicator of how quickly HUD ALJs can and will handle Fair Housing Act complaints. The use of such statistics can be misleading.

If Congress does not believe HUD can promptly process cases, despite statistics to the contrary, it could simply impose a time limit for decision, as has been done in other statutes, including certain cases under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA); and the Surface Transportation Act's treatment of whistleblower cases involving safety and health complaint by truckers, 49 U.S.C. §2305. Finally, in the recent proposed Davis-Bacon Act Amendments (HR 2216, copy attached) the statute dictates administrative finality within 270 days of initial filing by a petitioner.

Third, the linchpin of the testimony's argument that Article II judge proceedings would be slower than Article III judge proceedings is the single datum that the average time from filing to disposition, for federal district court civil rights cases, excluding employment cases, is eleven months. (Statement at 4). The fact is that some Title VII cases -- both individual and class actions -- span literally more than a decade and thousands of civil rights cases are in federal district courts for years before there is a trial or resolution. The median time for resolving civil rights employment cases in federal court is 13 months, according to the latest published data. An Analysis of the Workload of the Federal Courts for the Twelve Month Period Ended June 30, 1985, published in Reports of the Proceedings of the Judicial Conference of the United States and Annual Report of the Director of the Administrative Office of the United States Courts, (1985), at

318, Table C5A. [Mr. Reynolds' statistics excluded civil rights employment actions.]

It is axiomatic that most civil cases do not reach trial. They are settled, or are dismissed on summary judgment or F.R. Civ. P. Rule 12(b) motion. The testimony's sole statistic on federal district courts -- an eleven month average time for all non-employment cases -- masks the truth. The number includes weak or frivolous cases dismissed on summary judgment or on 12(b) motions. Where civil rights defendants refuse settlement and insist upon trial, it is clear that they wait years for their day in court.

Clearly, averages can deceive, as in the old saw about the average man with his head in the freezer and his feet in a furnace who might, "on average," have a body temperature of 98.6° Farenheight. We must look at the long delays faced in cases that do go to trial -- not just at averages.

Long federal district court delays are a fact of life that civil rights plaintiffs face all over the United States. Ten percent (10%) of all civil rights employment cases are resolved in more than 33 months, and ten percent (10%) of all other civil rights cases are resolved in more than 32 months. (Id.) Twenty months was the median time from filing to termination for employment civil rights cases going to trial, and 19 months was the median for all other civil rights cases going to trial. Of cases going to trial, ten percent of civil rights employment cases were in the federal courts for more than 45 months -- nearly four years -- before they were resolved, and ten percent of all other civil rights cases were in the federal courts for more than 43 months. (Id.) Further, the numbers of civil rights cases pending three or more years are simply staggering:

Civil Rights Cases Pending
in Federal District Courts
Three or More Years As of:

Civil Rights Category	6/30/82	6/30/83	6/30/84	6/30/85
Voting	19	22	18	15
Employment	1223	1069	982	1066
Accomodations	33	38	34	26
Welfare	44	59	57	41
Other	1045	1172	1137	1125
GRAND TOTAL	2364	2360	2228	2273

(Id., Table 33 at 165, 1983 Annual Report, Table 32 at 146.)

Contrary to the testimony's assertions, the facts reveal that thousands of civil rights plaintiffs wait years to get to trial in federal court.

The long delay in Article III judge adjudication of civil rights cases appears to be an operative fact Mr. Reynolds' testimony ignores. While there has been a slight dip in the average figures (to 11 months for employment civil rights cases and to seven months for all other civil rights cases), according to unofficial and not yet published statistics for the year ending 1986, the extreme delays of civil rights continue, and are no doubt very discouraging to thousands of civil rights plaintiffs waiting for their day in court. For example:

1. Ten percent (10%) of all civil rights employment cases tried were pending more than 59 months -- five years -- before they were resolved.

2. Ten percent (10%) of all other civil rights cases tried were pending more than 73 months -- over six years -- before they were resolved.

3. Ten percent (10%) of all civil rights employment cases resolved were pending more than 36 months -- over three years.

4. Ten percent (10%) of all other civil rights cases resolved were pending more than twenty months. (Administrative Office of the United States Courts, Statistical Division, tables to be printed in forthcoming 1986 version of Annual Report ..., supra).

Fourth, contrary to Mr. Reynolds' assertions, arbitrators more than likely would not be cheaper than administrative law judges (House Statement at 3-4). Arbitrators normally charge litigants a fee of at least $500 per day for hearings and work on decisions. Arbitration cases settle at roughly half the rate of cases that are tried. Administrative Conference of the United States, Points on a Continuum: Dispute Resolution Procedures and the Administrative Process by Phillip J. Harter (1983) fn. 53 (unpaginated). With fewer settlements and high per diem charges, arbitration may well cost more than administrative law judges. These higher costs may fall disproportionately on those least likely to be able to afford it -- those persons who are discriminated against. While Mr. Reynolds stated the annualized cost of an administrative law judge, including overhead, is $150,000 to $175,000, he has failed to: (a) document the figure or (b) show the costs per case adjudicated. For example, if an administrative law judge resolves 100 cases per year (not unusual in compensation cases in the Department of Labor and Social Security Administration), that would be a cost per case of roughly $150 to $175 -- less than 1/3 the cost for one arbitration. Arbitration would likely cost the Government more money than using administrative law judges, while providing less certain justice, as discussed infra.

Fifth, the testimony proposes that a scheme of alternative dispute resolution largely replace adjudication of Fair Housing Act cases, but it proposes that discriminatees retain the right to sue in federal district courts. While alternative dispute resolution or arbitration might be appropriate in some limited circumstances (as in minor personal disputes involving small claims) it is wholly inadequate and inappropriate in Fair Housing cases, and not just because of possible lack of due process for the litigants.

Where the public interest is as great as that involved in full and fair litigation of housing discrimination cases, alternative dispute resolution is an unacceptable substitute for trial of the issues. By its very nature, alternative dispute resolution or arbitration involves secret settlements, secretly arrived at, with the alleged discriminator's conduct shielded from public view. "Sunlight is the best disinfectant," Justice Brandeis said, and nowhere is this truer than in the area of housing discrimination. APA hearings afford parties a full and fair adjudication on the record and afford the public a record of the alleged discriminator's conduct, which cannot fail to have a salutary effect. APA hearings would provide open and accountable dispute resolution. Arbitration is difficult, if not impossible to appeal from, and is neither open nor accountable to the public, the Congress and the press. Nor has there ever been any showing that it is quicker or less expensive. In fact, arbitration is frequently more expensive than adjudication of simple cases through use of administrative law judges. Mr. Reynolds' proposal of "mandatory arbitration" (Statement to House Subcomittee on Civil and Constitutional Rights, May 7, 1987 at 7), which would provide for an "on the record" hearing, could not be conducted more quickly than an administrative law judge hearing, and would not have the advantages that a fully qualified judge brings to a proceeding.

Mr. Reynolds incompletely quotes the Administrative Conference of the United States report, Points on a Continuum: Dispute Resolution Procedures and the Administrative Process, by Phillip M. Harter (1986). Mr. Reynolds implies (House testimony at 8-9) that the Administrative Conference has endorsed arbitration in cases such as housing discrimination "where delays and costs should be minimized, norms of decision are well-established and technical expertise is desired," saying the criteria "speak directly to the Fair Housing context, where expeditious resolution of individual disputes is vital to the integrity of the statute."

Actually, the Administrative Conference report that Mr. Reynolds quotes had this to say about discrimination cases and arbitration:

> Formal decisions become *public goods that guide future conduct and provide a means of ensuring that the public welfare is achieved*. For example, if someone was the *victim of severe discrimination*, the public may demand a full vindication of the violation of the public's standards, even though the individual may be willing to settle for less. There is, therefore, some public policy against settlement...
>
> ... *some issues should be resolved in a formal, public manner because they involve issues transcending the immediate parties*. [Emphasis added].

(*Id*, unpaginated, fn. 353., § IX.) Incredibly, Mr. Reynolds' testimony ignores the Administrative Conference's list of the types of areas that are *not* suited for arbitration, appearing in the very same pages of the report he has selectively quoted to the House Subcommittee. The list of areas unsuited to arbitration shows: (a) how inappropriate arbitrators would be for Fair Housing Act cases and (b) how misleading it is for Mr. Reyolds to rely on the Administrative Conference materials. Arbitration, the Administrative Conference report says, is "generally *not particularly suited*" where:

- *Uniform results are desired* -- reaching similar results in similar cases.
- The *development of a "common law" or significant policy that will govern future decisions is important*.
- *Maintaining established norms or policies is important*; in these cases it is decided that the public policy expressed in established law outweights the ability of the parties to alter it by selecting the norms or even the forum where the law will be applied.
- *Public strutiny* of the process and the result is desired.
- *Strict "quality control"* is important and cannot be supplied by providing for the technical expertise of the arbiter.
- The matter affects some who are not parties so that they will *lack the ability to protect their interests* in the outcome.

(*Id*., text accompanying notes 66-67). [Emphasis added.] Each of these six reasons militates against arbitration of Fair Housing cases yet were ignored by Mr. Reynolds. Further, the Administrative Conference stated that the following reasons -- left out of Mr. Reynolds' incomplete list -- were arguments for arbitration:

- Time or transaction costs are *more important than the "accuracy" of any decision*.
- *No decision is of critical importance to any party*. ["Arbitration is frequently used where many claims need to be resolved expeditiously, no one of which is of fundamental importance to the parties." *Id*., fn. 65).
- The parties want to choose the basis of the decision,

especially if it is to different than the law that would be applied in a judicial proceeding.

- The parties desire privacy.

(Id., text accompanying fn. 64-66.) [Emphasis added].

Such reasons may be persuasive to past and potential discrimination defendants, but should not deter Congress from advancing the public interest in better Fair Housing laws. Discriminators may "desire privacy," and discriminators may be uninterested in the "accuracy" of arbitral decisions and not consider them of "critical importance." (Id.) Yet discrimination victims and society alike have a compelling national interest in "accuracy," fairness, consistency and uniformity of decision-making, and in public scrutiny of the process -- all because adjudication of Fair Housing cases affects all minority persons who are discriminated against, as well as society's interest in Fair Housing. As the report states, "Because [arbitration] is not a public process, the proceedings and the results can be kept private and confidential." (Id., text accompanying fn. 52-53). Further, rather than applying the law, the standard in arbitration "may also be and frequently is the arbitrator's 'own brand of justice.'" (Id., text accompanying fn. 51).

The Administrative Conference report, viewed in full, does not support Mr. Reynolds' views. In fact, a careful reading of the report strongly counsels against his approach of arbitrating Fair Housing cases.

As Mr. Justice Reed wrote in Wilko v. Swann, 346 U.S. 427 (1953), Congress has provided for arbitration "if the parties are willing to accept less certainty of legally correct adjustment." 346 U.S. at 438. [Emphasis added]. Arbitration normally involves cases involving commercial transactions and torts, where money -- not civil rights -- is the issue. The Fair Housing Act -- major anti-discrimination legislation enacted pursuant to Section Five of the Fourteenth Amendment -- is hardly a suitable area for such uncertain justice.

Sixth, Mr. Reynolds claims Congress, "apparently recognizing the benefits of arbitration over the ALJ process, amended the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) in 1978, replacing ALJs with arbitrators." (House testimony at 8.) This is very inaccurate.

Congress merely provided for arbitration of FIFRA disputes over cost-sharing (or "piggy-backing") between corporations of money spent to accumulate scientific data used to obtain pesticide permits, 7 U.S.C. § 136a(c)(1)(D)(1986). The Supreme Court has termed the subject of this arbitration of only a "limited right" given the pesticide producers by statute. Thomas v. Union Carbide Agricultural Products Co., 105 S.Ct. 3325, 3340 (1985). Cost-sharing arrangements are merely one small element of FIFRA.

In reality, administrative law judges at the Environmental Protection Agency are alive and well adjudicating a variety of FIFRA cases dealing with civil penalties, refusals to register, misbranding, changes of classification, and above all, adjudicating the massive, immensely complex cancellation/ suspension of pesticide registrations. These latter cases are arguably the most difficult and time-consuming matters tried by administrative law judges in the federal government. See 7 U.S.C. § 136a-y (1986) and 40 C.F.R. Parts 22 and 164 (1986).

Seventh, Mr. Reynolds claimed that arbitrators would provide "a hearing on the record, a written, reasoned decision by the arbitrator and the opportunity for judicial review." (House Statement at 7). Normally, arbitration decisions are reviewable on only a "very limited" basis, see, e.g. Administrative Conference report, Points on a Contiuum, (unpaginated, text accompanying notes 56-59); 9 U.S.C. § 10. As one arbitration article stated:

> The courts will not review the merits of the award and *confirmation will not be denied, nor will vactur be granted, upon a showing of error of law or fact on the part of the arbitrators*. The court's inquiry is confined to determining whether the award falls within the authority of the arbitrators, whether in form it reflects the honest decision of the arbitrators and whether the hearing generally comported with accepted standards of due process.

Kreindler, *Abitration Practice Under Federal Law*, 18 Forum 348, 357 (1983), cited in *Points on a Continuum* at fn. 58. [Emphasis added].

Arbitration decisions are not "explained with the rigor of an administrative [law judge] decision. The decision is usually a review of the factual and legal basis of the decision, but the rules typically indicate it is to be more abbreviated." [*Id*., text accompanying fn. 180-181]. Hearing records kept by a private arbitrator working for a government agency are not agency records under the Freedom of Information Act, and the agency would not be obligated to retrieve them from the arbitrator. [*Id*., fn. 184, citing *Forsham v. Harris*, 445 U.S. 169 (1980) and *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136 (1980).]

"The Supreme Court has made quite clear that arbitration is not a *judicial* proceeding subject to full faith and credit." [Emphasis in original]. [*Id*., fn. 199, citing *Dean Witter Reynolds, Inc. v. Byrd*, 105 S.Ct, 1238 (1985)]. Further, Title VII claims must be re-heard de novo in federal court even if they were the subject of a grievance arbitration. [*Points on a Continuum*, fn. 66, citing *Alexander v. Gardener-Denver Co*., 415 U.S.C 36 (1974)].

Chairman Edwards of the House Subcommittee on Civil and Constitutional Rights stated during the May 7, 1987 hearing that he doubted whether "some [part-time] downtown lawyer" from Tulsa could adjudicate Fair Housing cases better than administrative law judges. Circuit Court of Appeals Judge Clark, in a persuasive dissent to *Wilko v. Swann*, 201 F.2d 439 (2d Cir. 1953), *reversed* 346 U.S. 427 (1953), could have been answering Mr. Reynolds' arguments when he wrote:

> Since the very purpose of arbitration is to be rid of fancy legalisms, *the chief reason for arbitration is likely to be gone if the arbitrators are to act only like lawyers and judges*. Actually the suggestion cannot be carried out in any real sense; the arbitrators will act according to their business background and *there will be no way* -- unless they volunteer foolish explanations in their decision -- *of checking what they do*. So *what is most desirable in the ordinary arbitration becomes a clear loss of statutory right here*.

201 F.2d at 446 (Judge Clark, dissenting.) [Emphasis added].

Ninth, any "consent" to mediation or arbitration by *pro se* discrimination complainants may not be either knowing or voluntary. Worse, consent might be coerced by officials wanting to clear dockets. Parties involved in Fair Housing cases have vastly unequal bargaining power and resources. As in any negotiation, unequal bargaining power frequently produces unfair results, favoring the more powerful party. Arbitration and mediation would not be in the discriminatee's interest. Without an on-the-record APA hearing, there is no assurance that discriminatees' rights will be recognized, not to mention protected and vindicated.

Tenth, Mr. Reynolds' testimony assumes it is enough to allow home buyers and apartment renters who encounter discrimination to file a suit in United States District Court -- rather than have an APA hearing before an administrative law judge -- but only if discriminatees are dissatisfied with a "four-prong" alternative dispute resolution scheme. While federal district courts have many virtues, they are ill-suited to helping minority and disadvantaged persons who have been victimized by housing discrimination:

1. It costs $120 to file a complaint in federal district court, up 100% from a year ago. _Pro se_ litigants who are not found to be "paupers" by magistrate are often asked to post a cash bond for court costs of several hundred dollars (normally, an attorney signature is a substitute for the cash bond). If a _pro se_ litigant is not found to be poor, the door to the courthouse door is barred without a cash deposit. In addition, the federal courts charge all parties for transcripts (excepting only indigent criminal defendants) regardless of ability to pay. Without a transcript costing hundreds of dollars, it is impossible to appeal from any alleged judicial error committed that occurs during a trial or hearing. The Office of Administrative Law Judges in the Labor Department does not charge claimants for access to transcripts; presumably HUD would not charge civil rights complainants.

2. Many attorneys practice in state courts and do not or will not practice in federal court. Many federal civil rights plaintiffs' attorneys, perceiving increased hostility to civil rights actions from federal courts are completely moving out of the civil rights field. Others are starting to require large retainers -- $5000 to $10,000 -- before accepting a plaintiff's federal district court case. This further bars access to federal courthouses to those who suffer discrimination.

3. Many federal court judges discourage _pro se_ litigants, and many court clerks are not as helpful as they should be with _pro se_ plaintiffs. On the other hand, administrative law judges, whose proceedings are less formal, have a long history of capably and successfully dealing with _pro se_ litigants in Black Lung, Longshore, Social Security and other cases. Administrative law judges would be far more helpful to and patient with _pro se_ Fair Housing litigants than the Nation's very busy federal district judges.

4. At least thirteen federal district courts, including the Southern District of Florida (Miami) are experimenting with their own rigorous and separate Bar examination and admission procedures. The number of federal courts with their own separate admission standards may well increase in the years ahead as federal courts seek to assure greater attorney competence, further limiting the number of potential plaintiffs' lawyers in Fair Housing Act cases. _See_, _e.g._, "Implementation Committee on Admission of Attorneys to Federal Practice," published in _Reports of the Proceedings of the Judicial Conference of the United States_ (1985) at 84-85.

5. As discussed _supra_, long delays in adjudicating civil rights cases are common in Article III courts. Article III courts already have a very heavy docket of habeas corpus petitions from prisoners, federal administrative appeals from agencies such as the Social Security Administration, federal question cases in such complex areas as antitrust and securities law, and a heavy menu of diversity cases. While a federal district judge is by necessity a "jack of all trades," administrative law judges become specialists in the laws administered by their agencies. HUD administrative law judges would specialize in housing discrimination and become far more expert and experienced in that area than could most federal district judges. And, of course, expertise usually results in quicker disposition of cases.

6. Leaving Fair Housing Act cases in federal court means few will be filed, as the costs exceed the expected benefits

for many minority persons who are discriminatees. Adopting Mr. Reynolds' suggested position would preserve the *status quo*, making Fair Housing a noble goal without a ready remedy.

Eleventh (and finally), Mr. Reynolds' testimony errs if it concludes that only an Article III judge can apply the Federal Rules of Evidence and Federal Rules of Civil Procedure. (Senate Statement at pp. 4,8) Of course, the legislation or regulations under the Fair Housing Act could easily incorporate evidentiary and procedural Rules, (*see*, *e.g.*, 29 C.F.R. §§ 18.1(a) & 18.44, where the Department of Labor Office of Administrative Law Judges incorporated the Federal Rules of Evidence and Civil Procedure, except where there is a contrary law or regulation). As to the testimony's argument about lifetime tenure, (Senate Statement at pp. 4,8) administrative law judges are protected from unjust removals and harassment by the Civil Service Reform Act.

In conclusion Senator Metzenbaum, thank you for asking me to respond to Mr. Reynolds' views on the Fair Housing Amendments Act of 1987. As I am sure you will agree, the administrative law judge approach is the best road to assuring Fair Housing complaints will have the "just, speedy and inexpensive adjudication" promised 50 years ago by Rule 1 of the Federal Rules of Civil Procedure.

Sincerely,

Leonard E. Baloun

LEONARD E. BALOUN
President

Enclosure: HR 2216

ASSOCIATION OF ADMINISTRATIVE LAW JUDGES, INC.

JUL 23 87
U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE
LAW JUDGES

July 2, 1987

Senator Howard M. Metzenbaum
United States Senate
Washington, D.C. 20510

Re: Fair Housing Amendments Act of 1987, S.558

Dear Senator Metzenbaum:

You have asked for my response to the Administration/Senator Hatch bill, S. 867, the Equal Access to Housing Act, and Senator Hatch's Floor Statement on the bill (*Congressional Record*, Daily Edition, March 27, 1987, pp. S 4088-4091). The Administration/Senator Hatch bill, like the proposed Fair Housing Amendments Act of 1987, would amend Title VIII of the Civil Rights Act of 1964, but has a very different approach -- involving arbitration of Fair Housing cases -- raising serious Constitutional and policy questions. You have also asked for my response to the Seventh Amendment right to jury trial concern raised in testimony before the Senate Judiciary Committee's Subcommittee on the Constitution June 10, and July 1, 1987.

In his Floor Statement, Senator Hatch stated that his bill would "add teeth to the enforcement mechanism" by: (1) substituting mandatory or "binding" arbitration for the S. 558 administrative law judge adjudication approach; (2) encouraging use of magistrates to adjudicate Fair Housing cases; (3) limiting legal "standing" to sue, limiting use of "testers" and leaving the statute of limitations in Fair Housing cases at six months, thereby limiting the number of persons who may sue; (4) substituting an "intent" test for an effects test; (5) establishing a legislative veto over Title VIII regulations; and (6) removing primary administrative authority from the Department of Housing and Urban Development and placing it in the Justice Department. In testimony June 10, 1987, attorneys Paul Kamenar of the Washington Legal Foundation and Richard Nageotte of Woodbridge, Virginia joined Senator Strom Thurmond in arguing that S. 558 would violate the Seventh Amendment right to jury trial. Assistant Attorney General William Bradford Reynolds testified July 1, 1987 in partial agreement with this view.

Close scrutiny of the two bills leads me to conclude the Administration/Senator Hatch bill would not "add teeth" to Fair Housing enforcement -- it would be a step backward, signaling discriminators that the government will ignore their actions. Examination of Supreme Court decisions, a Justice Department memorandum and other materials lead me to conclude that arbitration of Fair Housing disputes would violate one or more important provisions of the Constitution, including the Delegation Doctrine, the Appointments Clause, the Due Process Clause and the President's duty to see that the laws are faithfully executed. Examination of Supreme Court decisions on the Seventh Amendment, testimony by Messrs. Kamenar and Nageotte, and the views of Professors Paul Carrington, Thomas Rowe, Jr., Girardeau Spann, Arthur Wolf, and Geoffrey Hazard, Jr., expressed to the Subcommittee June 10 and July 1, lead me to conclude there is no Constitutional infirmity in the Fair Housing Amendments Act of 1987.

I. The Administration/Sen. Hatch Bill Would Weaken Fair Housing Enforcement

First, arbitration has many flaws that were outlined in my May 11, 1987 letter to you: arbitrators lack the expertise and independence of administrative law judges, are only part-time lawyers with outside interests, and use procedures that are secretive and difficult or impossible to appeal from.

Further, as the New York Times recently reported, "most arbitrators are white men over the age of 65," and minorities fear that their grievances are not being heard by people who understand the problems caused by cultural differences." The Vice President of the American Arbitration Association admits that of 3400 arbitrators the Association lists, "there are maybe 20 minorities active, and that includes women." Further, arbitration is a field "notoriously difficult" for newcomers to enter "especially those from minority groups" and women, with "minorities ... historically underrepresented." New arbitrators have a poor chance of being selected because parties must agree on arbitrators, "reputation [is] the prime criteria for choice [and] an unfamiliar face stands a poor chance of being selected." Unlike administrative law judges, arbitrators must be "continuously accepted" by parties in order to hear cases. New York Times, June 28, 1987, p. 42. [Emphasis added].

In sharp and marked contrast, there are no such high institutional barriers to recruitment of minority and women administrative law judges, and since judges are assigned in rotation, parties cannot veto their hearing cases because they don't like their past decisions.

Clearly, arbitration:

> may lead disputants to make choices they would avoid if they were better informed. This is an area of particular concern to women, the poor, the elderly, persons for whom English is a second language, and other classes of disputants who are traditionally less powerful or less skilled at negotiation than their opponents. Further, nonlitigative methods may merely give the appearance of resolving some disputes while avoiding a finding of more extensive liability or leaving fundamental issues unsettled (e.g., an individual settlement in a products liability case while the company keeps manufacturing the defective part or an individual settlement of a discrimination complaint while the organization continues the prohibited practice).

National Institute for Dispute Resolution, Report of the Ad Hoc Panel on Dispute Resolution and Public Policy, "Paths to Justice: Major Public Policy Issues of Dispute Resolution," at 15 (October, 1983), reprinted in Administrative Conference of the United States, Sourcebook: Federal Agency Use of Alternative Means of Dispute Resolution at 23, (June, 1987). [Emphasis added].

As Marshall Tanick writes in the Spring, 1987 American Bar Association Litigation magazine, "Arbitration generally is consensual; it does not occur unless the parties agree." M. Tanick, "Thou Shalt Not Ignore Abitration," 13 Litigation 1 at 34. If a discriminatee were to lose an arbitration decision, it is clear that "the chance of a successful challenge is slight: most jurisdictions treat the arbitrator as final judge of both law and fact, subject only to an extremely narrow scope of judicial review." Id. at 37. In fact:

> Unlike an appellate tribunal reviewing a trial court, a court reviewing an arbitration award will only correct gross errors in process, not errors in substance. Thus, courts will refuse to upset an arbitration award even if clear factual or legal mistakes underlie the decision. Instead, a party challenging an arbitration award must show that the decision is so flatly contrary to established precedent, or so out of line with the facts shown in the hearing, that the arbitrator exceeded his power. But this line of attack is strictly an uphill fight.
>
> Corruption, fraud or other undue means, exceedingly hard to prove, are the principal grounds for vacating an arbitration award. Only when an arbitrator has been guilty of blatant wrongdoing is a court likely to pass on the propriety of his conduct.
>
> Proof problems in mounting a challenge are enormous. Establishing gross misconduct -- for example, that the arbitrator accepted a bribe -- is difficult.

Id. at 37,70. Yet Senator Hatch's bill permits the Attorney General to provide for binding arbitration, with no provision for appeal.

Public policy demands that discriminatees not be forced to arbitrate: arbitration should be reserved for consenting adults in cases that don't involve fundamental rights or entitlements -- typically cases involving commercial matters, not Constitutional rights. This is the position taken by the Administrative Conference of the United States (ACUS) June 12, 1987 in approving a Recommendation "Assuring the Fairness and Acceptability of Arbitration in Federal Programs." The ACUS Recommendation states:

> Congress should assess the desirability of mandatory arbitration in light of the extent to which a person's participation in the affiliated program is voluntary. For example, participation in an entitlement program is more likely to reflect need than consent, and should not be regarded as consent to arbitration of eligibility.

Id. at 3, § 2. A discrimination victim, like an injured worker suffering from an industrial disease and entitled to worker's compensation, has been injured by a corporation. Being discriminated against is no more "voluntary" than contracting asbestosis or Black Lung disease. Arbitration should not be forced on discrimination victims -- they need justice and a place to live -- not an unappealable ruling from a part-time corporation lawyer who occasionally hears Fair Housing cases. Where there is voluntary arbitration, the Administrative Conference recommends, Congress or an agency should:

> make the explicit judgment that arbitration is appropriate for the case or class of cases in question. Criteria for determinining whether arbitration is appropriate should include the following:
>
> (a) Cases subject to arbitration should involve questions of fact or the application of well-established norms, even if statutory, rather than precedential issues or application of fundamental legal norms that are evolving.
>
> (b) In determining whether to employ arbitration, Congress or the agency should consider the nature and weight of the private interests involved, the nature and weight of

> the government's interests, and the tradeoffs between the costs and benefits of arbitration and those of more formal processes: A heavy adjudicative caseload and the particularization of decisions in accord with previously declared guidelines justify the use of private arbitrators or other non-government persons.

Id. at 2-3, § 1. [Emphasis added]. Since Fair Housing is a fundamental human right that the government has a compelling interest in advancing, with case law evolving over time, the ACUS recommendations counsel strongly against involving arbitration.

As Associate Justice Lewis Powell wrote for a unanimous United States Supreme Court, in Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), concluded arbitration is "a comparatively inappropriate forum" for final resolution of rights arising under Title VII of the 1964 Civil Rights Act. Id. at 56. The Court held that where a labor-management arbitration heard discrimination charges, the arbitral finding could be admitted as evidence and given "such weight as the court deems appropriate" -- but that a federal court may not deny an employee a trial de novo after an unfavorable arbitral decision. 415 U.S. at 59-60. Clearly, the same considerations that apply to Title VII of the 1964 Civil Rights Act also apply to Fair Housing under Title VIII. If the Administration/Senator Hatch legislation were adopted, the courts might be expected to hold that despite its "mandatory" arbitration provisions, discriminatees can bring an action in Federal Court and obtain a de novo trial. As the Supreme Court's opinion in Alexander found:

> Parties usually choose an arbitrator because they trust his knowledge and judgment concerning the demands and norms of industrial relations. On the other hand, the resolution of statutory or constitutional issues is a primary responsibility of courts, and judicial construction has proved especially necessary with respect to Title VII, whose broad language frequently can be given meaning only by reference to broad public law concepts.
>
> Moreover, the factfinding process in arbitration is usually not equivalent to judicial factfinding. The record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination and testimony under oath, are often severely limited or unavailable. See Bernhardt v. Polygraphic Co., 350 U.S. 198, 203 (1956); Wilko v. Swan, 346 U.S. at 435-437. And as this Court has recognized, "[a]rbitrators have no obligation to give their reasons for an award." United Steelworkers of America v. Enterprise Wheel & Car Corp., 368 U.S. at 598. Indeed, it is the informality of arbitral procedure that enables it to function as an efficient, inexpensive and expeditious means for dispute resolution. This same characteristic, however, makes arbitration a less appropriate forumfor final resolution of Title VII issues than the federal courts.

415 U.S. at 57-8. Rejecting the employer's compromise proposal on use of arbitration in Title VII, the unanimous Supreme Court opinion by Justice Powell stated:

> ....[A] standard that adequately assured effectuation of Title VII rights in the arbitral forum would tend to make arbitration a procedurally complex, expensive, and

> time-consuming process. And judicial enforcement of such a standard would almost require courts to make de novo determinations of the employees' claims. It is uncertain whether any minimal savings in judicial time and expense would justify the risk to vindication of Title VII rights.

415 U.S. at 58-59. [Emphasis added].

On the basis of such irrefutable logic from the Supreme Court, the Administrative Conference, the American Bar Association Litigation Section the National Institute for Dispute Resolution, and the New York Times, Congress should make the informed judgment that arbitration is wholly inappropriate for Fair Housing cases.

Second, there are very serious questions about competence and objectivity of arbitrators that emerged from the National Academy of Abitrators meeting May 26-29, 1987. The questions led to creation of a special committee on professionalism, finding that there are "real shortcomings," including "much too long and poorly written opinions," rulings based on theoretical principles "without consideration of practicability or justice," awards "too broad for the dispute," and a lack of self-restraint." Bureau of National Affairs, Daily Labor Report, June 4, 1987 at C-3. Further, the National Academy of Arbitrators Special Committee on Professionalism found:

- "... as we read arbitration awards from day to day, we find ourselves becoming increasingly concerned over their current level of quality. Opinions are very often much too long and poorly written." (Id. at E-1).

- many believe arbitration has become "just another economic occupation" and the Academy has become "just another trade association." (Id. at E-1).

- at least among a minority of arbitrators, "there has been a declining level of respect for the necessary proprieties .... sufficent evidence of improper conduct -- sometimes on the part of our own members -- to require ... attention and corrective action." (Id. at E-3).

- "Some arbitrators openly solicit work. They write letters to the parties noting their availability, sometimes enclosing samples of their awards. They occasionally call on the parties at their offices for the same purpose. One arbitrator hands out ballpoint pens with his name printed on them; another hands out business cards to any and all takers. The AAA [American Arbitration Association] has felt it necessary to state in one of its publications a caution to arbitrators against giving gifts to [AAA] employees and a caution to employees about accepting such gifts. The Code [of Professional Responsiblity] prohibition against solicitation simply has been ignored in all of these instances. [Emphasis added]. (Id.)

- "Some arbitrators have been responsible for long delays in issuing awards. They keep the parties waiting many months, sometimes a year or more. They think nothing of asking helpless parties for extensions, or simply holding pending cases without even requesting an extension. Worse still, some fail to adjust their own work schedules so that past due awards and future awards will be rendered in a timely fashion. All of this is clearly inconsistent with professional responsibilities stated in the Code." (Id.)

o Some arbitrators overcharge parties. "Some arbitrators have scheduled two cases in a day for different parties, one in the morning and one in the afternoon. They then charge a full day for each hearing. Other arbitrators are reported to charge a fixed ratio of study days for each hearing day, and regardless of their actual study time. Such practices are expressly forbidden by the Code." (Id.)

o Other arbitrators don't seem to know their job and don't follow basic principles of ethics and propriety: "One arbitrator recessed a hearing and went to the men's room where one of the advocates said he was seen reading How Arbitration Works. Another held a hearing in a remote location with poor plane service, was forced to stay overnight because of a lengthy hearing, and shared the only available hotel room with one of the advocates." (Id.).

The National Academy of Arbitrators concluded "[t]hese are merely examples of what the Committee perceives as a growing insensitivity to Code requirements. No doubt part of the problem arises from the forces of the marketplace. All of us are aware of an ever-increasing pool of arbitrators competing for a decreasing number of cases.... it is hardly surprising that solicitation is on the rise. This may help explain the phenomenon, but it does not excuse it." (Id. at E-3-4). [Emphasis added].

Arbitrators have little emphasis on observing or promoting ethics as a profession, the NAC candidly admitted -- something Congress should carefully consider when deciding whether Administrative Law Judges or arbitrators should be deciding Fair Housing cases. As the Special Committee on Professionalism concluded:

> Apart from being given a copy of the Code when one is first put on the AAA or FMCS list, or perhaps when one becomes a member of the Academy, there is little mention of the Code in our work. The Code is placed in our desk or filing cabinet and rarely seen again. It is not a burning presence in the life of arbitrators. How many of us refer to it regularly for guidance? How many of us are truly familiar with most of its terms? Without such close familiarity, arbitrators are bound to overlook some phase of their professional responsibility.
>
> Equally important, there are those among us who view arbitration primarily as a business. They are likely to concentrate more on self-interest than the interest of the profession. Such a mind-set may help to maximize one's income. It does not help to maximize one's sensibilities to Code [of Professional Responsiblity] obligations and the necessary proprieties." (Id. at E-4). [Emphasis added].

Further, the NAC Committee on Professional Responsibility and Grievances of the NAC has issued only 15 advisory opinions on ethics issues in 40 years. Only once in memory has NAC imposed "discipline" on an arbitrator -- merely "advice to the member." (Id.) Arbitrators are "seldom willing to 'blow the whistle'" on their peers. Worse, arbitrators outside the NAC can only be disciplined by the AAA, FMCS or other appointing agencies, and says NAC "we are not aware of these agencies charging arbitrators with Code violations" or removing people from lists of arbitrators due to misconduct. (Id.)

While admitting very serious arbitrator competency and ethics problems, the NAC Special Committee on Professionlism refused to propose that the Academy evaluation of arbitral competency, and refused to propose state certification.

The National Academy of Arbitrators also admits it fails to investigate the moral character of new arbitrators seeking membership in the Academy. The Membership Committee has "at best, a dim idea of the applicant's reputation. Thus, the Membership Committee has little to go by. It simply assumes that the applicant is of 'good moral character' because no one has come forward to suggest otherwise." (Id)

With arbitrators asking such serious questions about their own ethics, competency and performance, it would be imprudent to give them responsibility for some of the most important cases under Federal law -- Fair Housing.

In sharp and marked contrast to woefully inadequate screening of arbitrators' character and competency, both lawyers and Administrative Law Judges are carefully scrutinized before they are licensed and commissioned. Before they can be appointed, prospective Administrative Law Judges must have seven years of litigation experience; pass a rigorous eight hour opinion-writing examination; have favorable recommendations from colleagues, opposing counsel, administrative law judges and State and Federal judges before whom they have practiced; and satisfactorily show they have the requisite judicial temperament.

In contrast to arbitrators, Administrative Law Judges consider their work a full-time professional career calling -- in great contrast to the arbitrators' view of their work as a part-time "sideline" trade or business. Governed by the Code of Judicial Conduct and the Code of Professional Responsibility of the American Bar Association, Administrative Law Judges can be removed only for good cause. The Office of Special Counsel in the Merit System Protection Board and agency Inspectors General are charged with probing allegations of wrongdoing by ALJs: both have tough investigators, and do not suffer from any of the peer pressure norms of the failed arbitral system of self-regulation.

An administrative law judge may not perform other duties inconsistent with work as a judge, 5 U.S.C. § 3105. An administrative law judge may not be supervised or directed by employees or agents involved in investigation or prosecution functions. 5 U.S.C. § 554(d). An administrative law judge may not engage in ex parte communications. Pay is controlled by the Office of Personnel Management, not the agency.

Further, the normal arbitral procedure is for the parties to have a large role in the selection of arbitrators -- the expectation of the Administrative Conference Recommendation, supra, at 3, § 3(b). A pro se Fair Housing complainant would not have an equal chance at helping pick arbitrators when the alleged discriminator's law firm has at its disposal vast library resources of arbitrator decisions -- some available only to corporation attorneys: the pro se complainant would likely know nothing about arbitrator candidates, resulting in the alleged discriminator striking all the arbitrators who might be sympathetic to the complainant. In contrast, administrative law judges are assigned to cases in rotation: parties do not choose the judge.

Third, the Administration/ Senator Hatch bill would not use administrative law judges, but would instead "encourage the use of Federal [M]agistrates to expedite" Fair Housing cases. Congressional Record, March 27, 1987, at p. S. 4088;

S. 867, 100th Cong., 1st Sess., at § 813(e). Legislative language proposed is merely exhortatory -- it expresses only the "sense of the Congress." It cannot bind United States District Judges. Further, Federal District Courts suffer from the serious trial delays evidenced in the statistics in my May 11 letter to you. Parties in Federal Court -- particularly defendants -- seldom choose to waive their rights to a jury trial before an Article III judge to allow a magistrate to try the case. Assigning Fair Housing cases to Magistrates would probably just delay all cases heard by them -- including hearings for federal criminal defendants, discovery disputes in civil cases, Social Security appeals and habeas corpus cases. Adding Fair Housing cases to their already heavy dockets would delay justice for everyone. Further, individual United States Magistrates would probably never have the caseload or time to develop expertise in Fair Housing matters. In contrast:

> Since *administrative law judges* specialize in one field of law, they *are more likely to* know the relevant case *law than will a district court judge [or magistrate]*.... *One of the primary advantages of trying a case before an administrative law judge is the judge's expertise* -- after a judge has tried 100 black lung cases, he has learned a lot about lungs. Federal Trade Commission judges know more about economics than many economics students.... Administrative law judges provide the expertise to handle administrative adjudications in a fair and efficient manner.

Lawrence Postol, "Litigating Cases Before Administrative Law Judges," 13 *Litigation* 47 at 49,51 (Spring, 1987). [Emphasis added].

Fourth, the Administration/Senator Hatch legislation would limit "standing" to sue, limit use of "testers," and continue to limit the statute of limitations to six months.

Though the Supreme Court has unanimously held that testers do have "standing" to sue, the Administration/Senator Hatch legislation would clearly gut this elemental feature of Fair Housing law made clear in *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), *a unanimous Supreme Court decision upholding* standing of "testers" given false information on housing availability by discriminators. Congress clearly intended Fair Housing Act "standing" to extend to the full limits of Article III of the United States Constitution, *Havens Realty*, supra, 455 U.S. at 372-73; *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91 (1979). *Especially where there are illegal practices* like hard-to-detect racial "steering" by discriminators, or where persons discriminated against do not know it, are fearful or cannot afford to pursue litigation, the use of "testers" by groups like the National Association for the Advancement of Colored People (NAACP) is *absolutely indispensible* to Fair Housing enforcement.

Senator Hatch's Floor Statement did not mention this proposal would be a truly radical alteration of *stare decisis*; he did harshly denounce public interest groups for "harass[ing] small businessmen and communities." *Cong. Record*, p. S. 4089, March 27, 1987. Elimination of "tester" standing would allow discriminators to "harass" and discriminate without being held accountable for their actions. The proposed "standing" limitations proposed are regressive and should be rejected.

While S. 558, the proposed Fair Housing Amendments Act of 1987, would extend the statute of limitations to one year, the Administration/Senator Hatch proposal would leave it at six months. Extending the statute to at least one year is manifestly in the public interest, and consistent with the limitations periods in cases brought pursuant to 42 U.S.C. § 1983 (where there is a minimum of one years to file-suit, and more depending on analagous state tort statutes of limitations). It is axiomatic that statutes of limitations do not terminate the right, but cut off the remedy. Giving people only 180 days to sue for Fair Housing cases gives them one of the shortest statutes of limitations under Federal law; extending the statute will strengthen enforcement by giving discriminatees time to learn of their rights and remedies before barring suit forever.

Fifth, the Administration/Senator Hatch bill would alter *stare decisis* by substituting a discredited "intent" test for the "effects" test long used in civil rights law, repealing inescapable logic. As the United States Court of Appeals for the Eighth Circuit held in *United States v. City of Black Jack*, 508 F.2d 1179 (8th Cir. 1974):

> Effect and not motivation is the touchstone, in part because *clever men may easily conceal their motivations*...

508 F.2d at 1184-5. [Emphasis added]. Using an "intent" test would neuter Fair Housing enforcement, protecting those "clever" enough to disguise their true intent. The only persons whom the Administration/Senator Hatch "intent" test could ever catch would be those discriminators rude or inept enough to say "I won't rent to you because you're not white," or similar words. This would be yet another giant step backward in Fair Housing enforcement.

Sixth, the Administration/Senator Hatch bill proposes a legislative veto over the Fair Housing regulations without requiring the legislative veto be presented to the President. S. 867, (100th Cong., 1st Sess), §§ 7(e)(1) & (2); *Cong. Record*, March 27, 1987 at S 4089-90. A legislative veto was found unconstitutional in *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983). That legislative veto required only one house to veto an administrative action expelling an alien, and it was found to violate the provisions of the Constitution requiring both bicameral action on legislation and presentment to the President for his approval or veto. The Administration/Senator Hatch legislation would establish a two-House veto but would not require such Congressional action be presented to the President. This appears to violate the Presentment Clause of the United States Constitution:

> *Every* Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) *shall* be presented to the President of the United States; and before the Same shall take Effect, *shall* be approved by him, or being disapproved by him, *shall* be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill. United States Constution, Art. I, § 7, cl. 3. [Emphasis added by Justice Powell in *Chadha*, supra, , 462 U.S. at 945-46.]

As the Supreme Court stated in *Chadha*:

> Presentment to the President and the Presidential veto were considered so imperative that the draftsmen took special pains to assure that these requiremens could not be circumvented. During the final debate on Article I, § 7, cl. 2, James Madison expressed concern that it might

> easily be evaded by the simple expedient of of calling a proposed law a "resolution" or "vote rather than a "bill." 2 Farrand 301-302. As a consequence, Art. I, § 7, cl. 3, supra was added. 2 Farrand 304-305.

462 U.S. at 946-47. The Presentment Clause operates as a check on Congress, reflecting "the Framers' careful efforts to check whatever propensity a particular Congress might have to enact oppressive, improvident or ill-considered measures." 462 U.S. at 947-48. As Alexander Hamilton said, the Presentment Clause increases the chances against "passing bad laws, through haste, inadvertence or design." The Federalist, No. 73, quoted at 462 U.S. 948. The Supreme Court found the Presentment Clause assures a "'national' perspective is grafted on the legislative process." The President is:

> a representative of the people just as the members of the Senate and of the House are, and it may be, at some times, on some subjects, that the President elected by all the people is rather more representative of them all than are the members of either body of the Legislature whose constituencies are local and not countrywide....

462 U.S. 948, quoting Myers v. United States, 272 U.S. 52, 123 (1926).

The Administration/Senator Hatch bill's proposed legislative veto over Fair Housing regulations violates the Constitution's Presentment Clause: therefore, the bill is unconstitutional.

Seventh, the Administration/Senator Hatch legislation would remove Fair Housing enforcement from the Department of Housing and Urban Development (HUD), placing it in the Justice Department. This approach is explained by stating that the Justice Department has more experience in civil rights enforcement, and that HUD has:

> demonstrated a fundamental conflict betweeen its obligation to fairly administer the law and its primary mission to set national housing policy. Enforcement of Title VIII is, first and foremost, a matter of insuring compliance with the law; too often, it has been used by HUD as an instrument of social engineering policy.

Cong. Record, p. S. 4088 (March 27, 1987). Senator Hatch provides no support for his assertions; the essence of the argument is an objection to HUD involvement because HUD officials may believe too strongly in the Fair Housing Act, compared with the meeker Justice Department. Senators should rely on their knowledge of the Justice Department's recent civil rights enforcement record, as well as HUD's record.

Agencies with "missions" in public policy areas routinely and capably enforce laws in those areas -- the Department of Labor administers the Longshore and Black Lung programs, not the Department of Justice. Adopting the Administration/Senator Hatch proposal would be a step toward making the Justice Department a "supercabinet" agency, taking over every law administration function from agencies with "missions" that might be interpreted as conflicting with impartially enforcing the law. Instead of having 25,000 employees, the Justice Department might soon have 250,000, mushrooming into unmanageable proportions while removing administration of laws from the very agencies that should administer them. The "conflict of interest" argument about agency adjudication is widely rejected, and an agency's familiarity with the subject area far outweighs any possible prejudice. See, e.g., Lawrence Postol, "Litigating

Cases Before Administrative Law Judges," supra at 47. Making the Justice Department the "lead agency" for Fair Housing Act cases would set an mischievous prececedent. The approach would be completely unworkable.

II. Using Arbitrators to Decide Fair Housing Act Cases Would Be Unconstitutional

Using arbitrators to decide Fair Housing cases would violate one or more provisions of the Constitution, including the Delegation Doctrine, the Appointments Clause, the Due Process clause and the President's duty to see that the laws are faithfully executed.

First, the Supreme Court has stated in several major cases that it is unconstitutional to delegate law-making or enforcement functions to private actors because they involve the performance of a significant governmental duty exercised pursuant to a public law." Buckley v. Valeo, 424 U.S. 1, 140-141 (1976). Such functions must be performed by Officers of the United States who are apponited in accordance with the Appointments Clause, Article II, section 2, clause 2 of the U.S. Constitution. Id. As an April 24, 1986 memorandum from the Justice Department's Office of Legal Counsel concludes:

> Delegation of certain governmental functions to arbitrators and other persons who are not officers of the United States, therefore, may violate the Appointments Clause.

Id. at 2 [Enclosed.] The Administration/ Senator Hatch legislation makes no provision for arbitrators to be either federal officers or federal employees, leaving the way clear for employment of part-time arbitrators, selected by the parties, which "may violate the Appointments Clause." Id.

Second, use of private arbitrators may violate the Delegation Doctrine, under which the Supreme Court struck down the National Recovery Act's delegation of law-making functions to private industry groups, see Carter v. Carter Coal Co., 298 U.S. 238, 311 (1938); A.L.A. Schecter Poultry Corp. v. United States, 295 U.S. 495, 537 (1935). The Administration/Senator Hatch bill proposes "not ... delegation to an official or an official body, presumptively disinterested, but to [arbitrators, who are] private persons whose interests may be and often are adverse to the interests of" discrimination victims. Carter v. Carter Coal, supra, 298 U.S. at 311. While advisory or analytical functions may be delegated to private actors, basic governmental functions like law-making and adjudication may not. In considering Delegation Doctrine cases, the Supreme Court has looked at:

> factors such as lack of standards, the possibility of arbitrary or selfish decisions, and the lack of any review in any governmental body contributed to the judicial determination that delegating such functions to private parties violated due process.

April 24, 1986 Justice Department memorandum, supra, at 2. While administrative law judges are obligated to follow the Administrative Practice Act, the Administration/Senator Hatch bill sets no standards set for arbitrators to follow in handling Fair Housing cases -- arbitrators could literally operate as free agents, "uncontrolled by any standard or rule prescribed by legislative action..." State of Washington ex rel Seattle Trust Co. v. Roberge, 278 U.S. 116,122 (1928). There is no provision for judicial or administrative review of an arbitration decision other than those very narrow provisions already existing in the Arbitration Act, 9 U.S.C. § 1, et. seq.; see supra at 2-6. There is no guarantee against arbitrary or selfish decisions -- a real possibility given arbitral ethics and accountability problems, see supra at 5-8.

Consider the hypothethical example of an arbitrator who is also a lawyer with a law firm that represents real estate clients. Clearly, ethical standards would require that arbitrator to disqualify himself if the law firm represents a real estate development firm accused of discrimination. Discovery of such conflicts of interest would be very difficult, if not impossible, for pro se Fair Housing complainants.

The Supreme Court has held that Due Process is violated when a decision-maker has an economic stake in a judicial or administrative decision's outcome that creates a conflict of interest. Tumey v. Ohio, 273 U.S. 510 (1927), Ward v. Village of Monroeville, 409 U.S. 57 (1972) and Gibson v. Berryhill, 411 U.S. 564 (1973), Whether it involves a small town mayor whose income flows directly or indirectly from fines paid by the criminal defendants whose cases he decides as a judge, (Tumey, Ward) or a state licensing board composed of independent optometrists sitting in judgment on their direct competitors working for discount eyeglass firms (Gibson), conflict of interest is a clear and present danger. Like perjury, conflict of interest threatens to pollute the waters of justice wherever it occurs. The prohibition against conflict of interest "applies with equal force to ... administrative adjudicators," Gibson, supra, 411 U.S. at 579, quoting K. Davis, Administrative Law Text, § 12.04, p. 250 (1972).

If the Administration/ Senator Hatch bill were adopted, protecting the integrity of the arbitral process would quickly become an arbitral nightmare. A massive computer operation might be required to identify conflicts of interest between arbitrators' law firm clients and parties in Fair Housing cases. The smallest amount of legal work for a Fair Housing case party might require the arbitrator's disqualification. As the Supreme Court held in Tumey:

> There are doubtless mayors who would not allow such a consideration as $12 costs in each case to affect their judgment in it, but the requirement of due process of law is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice. Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the state and the accused denies the latter due process of law.

273 U.S. at 532.

There is a more subtle conflict of interest problems inherent in allowing a lawyer with a firm that does substantial work in real estate matters to arbitrate Fair Housing Act cases. An arbitration decision against the real estate developer could be used as a precedent against another local real estate firm that the arbitrator or his law firm represents; a negative decision might easily cost the arbitrator money as a private attorney. The arbitrator might be very reluctant to offend a law firm client who is a friend and colleague of the Fair Housing defendant, shares the dais with him at real estate functions, is involved in a joint venture apartment building on the outskirts of town, and otherwise has a close community of interests and associations.

If the Administration/Senator Hatch bill were ever adopted, to avoid the due process perils inherent from conflicts of interest it might be necessary to disqualify all arbitrators working for law firms doing any real estate work, on the grounds they might fear alienating local businessmen who have a substantial community of interests, joint ventures and affiliations with businessmen charged with Fair Housing Act violations. Yet this might disqualify upwards of 80% of the lawyers in the United States, creating an arbitral nightmare in selecting arbitrators from among the few remaining attorneys who might be interested, qualified and available. Failure to disqualify lawyers whose law firms represent real estate firms might leave every arbitral denial of a Fair Housing claim open to Due Process attack on the grounds the arbitrator's law firm represented real estate companies, raising the due process issues involved in Tumey, Ward and Gibson, supra.

The answer to these arbitral conflict of interest problems is administrative law judges, who would not have the same conflicts of interest as practicing lawyers; the administrative law judge adjudication established by S. 558 is the best way to guarantee all parties' Constitutional rights.

While the Supreme Court approved commercial arbitration under government auspices in Thomas v. Union Carbide Agricultural Products Co., 105 S.Ct. 3325, it was in a narrow opinion where the parties did not raise: (a) arbitration of fundamental rights, (b) the Appointment Clause or (c) the Delegation Doctrine. Thomas merely addressed whether an Article III court must hear private disputes involving cost-sharing on scientific tests used to obtain pesticide licensing under FIFRA (the Federal Fungicide, Insecticide and Rodenticide Act).

Further, the Supreme Court did not address the President's Constitutional duty to see that the laws are faithfully executed, or the Execution Clause. If arbitrators are neither government officers nor government employees, will they be more accountable to private parties that might hire them in the future? Will potential employment as an arbitrator in commercial real estate transactions make them curry favor with Fair Housing defendants rather than uphold the Fair Housing Act?

In summary, one or more provisions of the Constitution -- the Appointments Clause, the Delegation Clause, Due Process and the Execution Clause -- would be violated by use of private arbitrators to decide Fair Housing cases. The clear alternative to this arbitral nightmare is S.558 -- adjudication by administrative law judges pursuant to the Administrative Practice Act. Administrative law judges are accountable and lack the panoply of potential conflicts of interest inherent in the work of the archetypical private arbitrator -- whom Congressman Don Edwards has termed "some downtown lawyer" from Tulsa.

III. Administrative Law Judge Adjudication Will Not Violate the Seventh Amendment Right to Jury Trial

Senator Hatch 1/ and two Senate Judiciary Committee

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1. Senator Hatch's argument was at a June, 1987 Administrative Conference seminar that was unfairly used as a de facto "pep rally" for federal agency use of arbitration. There was no representation of those opposing increased use of arbitration. The public was excluded from the meeting, in violation of at least the spirit of the Sunshine Act.

witnesses suggested the Seventh Amendment right to jury trial would be violated if administrative law judges adjudicate Fair Housing cases. This argument is without merit, as the Supreme Court has repeatedly held, as recently as April 28, 1987, that the Seventh Amendment right to jury trial does not apply to administrative agencies. As the Court stated in Tull v. United States, 107 S.Ct. 1831, (1987):

> The Court has ... considered the practical limitations of a jury trial and its functional compatability with proceedings outside of traditional courts of law in holding that the Seventh Amendment is not applicable to administrative proceedings. See, e.g., Atlas Roofing Co. v. Occupational Safety and Health Review Commission, 430 U.S. 442, 454 (1977; Pernell v. Southall Realty, 416 U.S. at 383 (1974). But the Court has not used these considerations as an independent basis for extending the right to a jury trial under the Seventh Amendment.

107 S.Ct. at 1835, fn. 4. [Emphasis added]. The Supreme Court has found no Seventh Amendment violation in administrative law judges adjudicating cases, "even if the Seventh Amendment would have required a jury where the adjudication of those rights is assigned to a federal court of law instead of to an administrative agency." Atlas Roofing, supra, 430 U.S. at 455. The Supreme Court has approved adjudication of Longshoreman's and Harbor Worker's Compensation Act cases by administrative agency of the Department of Labor, Crowell v. Benson, 285 U.S. 22 (1932), and unfair labor practices by the National Labor Relations Board NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) -- even though these cases involve private parties, and what some would construe as damages remedies.

As Professors Carrington, Wolf, Rowe and Hazard concluded in their statements to the Senate Judiciary Committee's Subcommitte on the Constitution, there is no constitutional infirmity in S. 558. Professor Hazard characterized the Washington Legal Foundation's views on the jury trial issue as "strained," stating that "The very awkwardness of the argument, therefore suggests it is incorrect," emphasizing the Foundation failed to acknowledge "the effect and continuing force of the Atlas Roofing decision.

On July 1, 1987, Assistant Attorney General William Bradford Reynodlds told the Subcommittee that that use of administrative law judges would be unconstitutional, but not if an Article III jury decided damages, or a Federal Magistrate did so with consent of the parties. This represents a moderation of prior views, but is still mistaken, and is contradicted by the views expressed by the General Counsel of the Department of Housing and Urban Development.

In conclusion, Senator Metzenbaum, thank you for asking for my views about the Administration/Senator Hatch proposal versus the Fair Housing Amendments Act of 1987, S. 558. As I am sure you will agree, the Administration/Senator Hatch proposal is unworkable and unconstitutional, while S. 558 is a sound and reasonable proposal to assure that the goals of the 1968 Fair Housing Act are finally met.

Sincerely yours,

Leonard E. Baloun

LEONARD E. BALOUN
President

U.S. Department of Justice
Office of Legal Counsel

Office of the
Deputy Assistant Attorney General

Washington, D.C. 20530

MEMORANDUM FOR STEPHEN J. MARKMAN
Assistant Attorney General
Office of Legal Policy

Re: Administrative Conference Recommendation on Federal Agencies' Use of Alternative Dispute Resolution Techniques

This responds to your request for the views of the Office of Legal Counsel on the above-captioned recommendation. The recommendation, drafted by the Administrative Conference of the United States, calls on executive branch agencies to make greater use of alternative dispute resolution ("ADR") techniques in informal adjudication, rulemaking, issuing or revoking permits and in settling disputes. It also calls on Congress to enact legislation authorizing the use of ADR techniques to resolve matters that would otherwise be decided by agencies pursuant to the Administrative Procedure Act. ADR techniques include voluntary arbitration, mandatory arbitration, factfinding, minitrials, mediation, facilitating, convening and negotiation.

The Administrative Conference recognizes that further research and consultation is required before detailed procedures, applicable to numerous government programs and agencies, may be prescribed. Accordingly, we confine our comments to those of a general nature. We believe that an analysis of the practical implications of such a proposal must be left to the litigating divisions. However, the recommendation does raise some potential constitutional concerns. When more specific guidelines and legislation are developed, we would be happy to provide a thorough discussion of the constitutional issues.

Our comments relate to the use of private individuals or organizations in determining matters concerning private parties and the government that ordinarily would be determined by government agencies in the first instance, with judicial review in most cases. First, we point out that some agency functions, like rulemaking and issuing or revoking permits, may not be delegated to private individuals because they involve the "performance of a significant governmental duty exercised pursuant to a public law." Buckley v. Valeo, 424 U.S. 1, 140-141 (1976). Such functions must be performed by "Officers of the United States," appointed in accordance with the Appointments Clause, Article II, section 2, clause 2 of the Constitution. Ibid. Delegation of certain governmental functions to arbitrators or other persons who are not officers of the United States, therefore, may violate the Appointments Clause.

Second, we believe that the Administrative Conference recommendation may raise an issue under the delegation doctrine. The delegation doctrine expresses the constitutional concern that significant executive or legislative power be exercised by officers of the United States appointed or elected in accordance with the Constitution. See generally Liebmann, "Delegation to Private Parties in American Constitutional Law," 50 Ind. L. J. 650 (1975).

Although the case law relating to the validity of delegating statutory powers to private entities has not "crystallized any consistent principles," Davis, *Administrative Law Treatise* 3.12 (2d ed. 1978), the Supreme Court has on various occasions held such delegations invalid. See *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1938); *Seattle Title Trust Company v. Roberge*, 278 U.S. 116, 121-23 (1928); *Eubank v. City of Richmond*, 226 U.S. 137, 143-44 (1912). Cf. *A.L.A. Schecter Poultry Corp. v. United States*, 295 U.S. 495, 537 (1935). In these cases and in others, see, *e.g.*, *North Carolina Association for Retarded Children v. North Carolina*, 420 F. Supp. 451, 455-56 (M.D. N.C. 1976), factors such as the lack of standards, the possibility of arbitrary or selfish decisions, and the lack of any review in a governmental body, contributed to the judicial determination that delegating such functions to private entities violated due process.[1] By proposing the delegation of various governmental functions to private parties, the Administrative Conference recommendation may be subject to criticism on one or more of these grounds.

In conclusion, we note that the use of ADR techniques by government agencies may be constitutional under certain circumstances. In *Thomas v. Union Carbide Agr. Products Co.*, ___ U.S. ___, 105 S. Ct. 3325 (1982), the Supreme Court upheld a provision of the Federal Insecticide, Fungicide and Rodenticide Act mandating binding arbitration with only limited judicial review as the mechanism for resolving disputes among participants in the Act's pesticide registration scheme. Rejecting a challenge based on Article III of the Constitution, the Court ruled that "Congress, acting for a valid legislative purpose pursuant to its constitutional powers under Article I, may create a seemingly 'private' right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary." *Id.* at 105 S. Ct. 3340. Although the Court had no occasion to address the Appointments Clause or the delegation doctrine, it did recognize "the ability of Congress to adopt innovative measures such as negotiation and arbitration with respect to rights created by a regulatory scheme." *Ibid.*

We appreciate the opportunity to comment on this recommendation. Please let us know if we may be of further assistance.

Samuel A. Alito, Jr.
Deputy Assistant Attorney General
Office of Legal Counsel

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[1] Functions of an advisory or analytical nature, without determinative effect on the exercise of federal functions, however, may be constitutionally delegated to private entitites. See *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 399 (1940); *Todd and Company, Inc. v. S.E.C.*, 557 F.2d 1008, 1012-13 (3rd Cir. 1977).

SENATOR HEFLIN'S QUESTIONS

FOR JUDGE BARLOW

1. OPPONENTS OF THE INDEPENDENT CORPS OF ADMINISTRATIVE LAW JUDGES STATE THAT THE CURRENT PROVISIONS OF THE ADMINISTRATIVE PROCEDURE ACT (APA) ARE SUFFICIENT TO PROVIDE THE NECESSARY PROTECTION FROM UNDUE AGENCY INFLUENCE. YOU OBVIOUSLY DISAGREE WITH THIS STATEMENT. WHY?

2. THE MAIN CONCERN OF THOSE WHO ARE SKEPTICAL OF THE CORPS CONCEPT IS THE POTENTIAL LOSS OF EXPERTISE OF ADMINISTRATIVE LAW JUDGES. HOW DO YOU FORMULATE A CORPS THAT MAINTAINS THE NEEDED EXPERTISE WHILE PROVIDING AN EFFICIENT AND COST-EFFECTIVE SYSTEM?

3. MANY PERCEIVE ADMINISTRATIVE LAW JUDGES AS AN EXTENSION OF THE AGENCY WHICH EMPLOYS THEM. HOW DO YOU RECONCILE THE ROLE OF AN ADMINISTRATIVE LAW JUDGE AS THE "CONSCIENCE OF THE AGENCY" AND AN IMPARTIAL ARBITER?

4. THE ADMINISTRATION IN THE PAST HAS ADVOCATED THE CREATION OF AN ARTICLE I COURT TO HEAR SOCIAL SECURITY CASES.

IS THIS THE PROPER RESPONSE TO THE PROBLEMS CURRENTLY BEING FACED BY SOCIAL SECURITY CLAIMANTS?

5. IN TESTIMONY RECEIVED HERE TODAY IT HAS BEEN STATED THAT THE HEALTH CARE FINANCING ADMINISTRATION ASSUMES RESPONSIBILITY FOR MEDICARE PART B APPEALS ON OCTOBER 1, 1987, AND PART A IN 1988. WHAT IMPACT, IF ANY, WILL THIS HAVE ON SOCIAL SECURITY ADMINISTRATIVE LAW JUDGES?

6. ONE OF THE CRITICISMS OF THIS BILL HAS BEEN THAT AGENCIES WILL SIMPLY NOT USE THE ADMINISTRATIVE LAW JUDGE CORPS IF IT IS SET UP AS AN INDEPENDENT AGENCY. WHAT HAS BEEN YOUR EXPERIENCE IN THAT AREA? IS IT POSSIBLE FOR THE AGENCIES TO MAKE AN END RUN AROUND THE ADMINISTRATIVE LAW JUDGES--ARE THERE OTHER ALTERNATIVES FOR THE ADMINISTRATIVE AGENCIES TO ACCOMPLISH THEIR GOAL OTHER THAN THROUGH THE ADMINISTRATIVE ADJUDICATIVE PROCESS?

ASSOCIATION OF ADMINISTRATIVE LAW JUDGES, INC.

August 26, 1987

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Honorable Howell Heflin,
Chairman, Subcommittee on Courts
and Administrative Practice,
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Senator Heflin:

I appreciate the opportunity to assist this Subcommittee in the preparation of a record concerning the feasibility of Senate Bill 950 (known as the "Administrative Law Judge Corps Act").

The first of the questions which you have posed is one which cannot be answered succinctly. Thus I ask your indulgence to permit me to recount the history of the many efforts by Congress to investigate this very problem. At the outset it must be made perfectly clear that while the Administrative Procedure Act (hereinafter refered to as APA) purports to provide protection from undue agency influence, the statute merely proscribes certain conduct without providing the mechanism to enforce these proscriptions.

The APA specifically excludes Administrative Law Judges from merit salary increases, and from evaluation by performance appraisal (see 5 U.S.C. 4301(2)(D) and 5 U.S.C. 4302). Nothwithstanding these provisions, the Social Security Administration has long been rating the performance of its judges both in terms of quantity and quality. While Congress and the Courts have studied this problem, and condemned the Social Security Administration's practices, neither have been able to prevent the agency's abuses and flagrant violations of the APA.

On July 18, 1978, Congressman Ron Marlenee wrote to the then Chairman of the House Committee on Government Operations asking that a subcommittee be designated to investigate continuing egregious practices. In his letter he stated that these practices may:

> "(1) Have the cumulative effect of intimidating Administrative Law Judges into a greater number of decisions and fewer reversals of administrative decisions of claims under threat of adverse personnel actions, denial of usual and normal benefits such as training conferences, or other threats

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> of retaliation, all to the detriment of the ALJ's being able to render fair, impartial, consistent and judicially sound decisions for claimants applying for benefits under the Social Security Act;
>
> ...
>
> (3) Have resulted in a general deterioration of morale of many federal employees of the Bureau of Hearings and Appeals thus resulting in the filing of a number of law suits against management, demonstrations by other professional employees in the Arlington central office, numereous grievances and other actions, most of which remain unresolved and could result in many resignations, dismissals or injustices by or to otherwise competent and qualified employees;
>
> (4) Have developed a pattern of management initiatives, memorandums, proposals and policies, often without due consideration of employees or existing applicable law or regulations, which have resulted in unnecessary layers of management, a realignment of traditionally workable and legal procedures, and a general suspicion that the ultimate purpose of management is to eliminate the Administrative Law Judge system, or at the very least, cripple the intent of Congress that Administrative Law Judges should be relatively independent to decide cases on the basis of fact and law without direct management intervention; and
>
> (5) May be patently illegal, contrary to Congressional intent, and grossly unfair to claimants, employees, and the Social Security Trust Fund." see WMCP:96-2, p. 106, 96th Cong.

Congressman Marlenee's request resulted in a hearing being held on January 27, 1979, at which the Congressman's suspicions were confirmed. Ibid.,

Unfortunately, no action was taken to stop these abuses, and, needless to say, they continued.

Thereafter, hearings were held in 1981, and 1983. Appearing on behalf of this Association at both those hearings was its President, Judge Charles N. Bono. Judge Bono who had been in the forefront of the movement to insulate the judges from agency pressure (he along with others sued the Social Security Administration in the now well known Bono, et al. v. U.S., Social Security Administration, et al., U.S.D.C., W.D. Mo., No. 77-0819-

CV-W-4) addressed the same issues in both hearings. Judge Bono noted that the law suit that he and five other judges instituted sought to curtail the egregious practices that Congressman Marlenee had outlined. In a stipulation of settlement, the agency "agreed to abide by provisions of the APA and discontinue the complained-of practices in setting quotas of hearings and decisions, failure to rotate cases, and other enumerated practices that had adversely affected the fairness of the hearing process." (see S.Hrg 98-296 before the Subcommittee on Oversight of Government Management June 8, 1983, at p. 66)

In his oral statement, Judge Bono testified that:

> history has established that the Social Security Administration has a documented record of mismanagement, misconception, and improper management pressures in its records, so far as the operation of hearings and appeals is concerned. Its misguided management policies were documented in previous congressional hearings that were held and survey and issue papers reported out of those congressional hearings in 1979. History has repeated itself within a very short time, and we are now faced with new programs of the Social Security Administration to increase productivity, monitor production rates of administrative law judges, and allowance rates of the judges, and generally rate and evaluate their performance for purposes alleged by them to be proper management practice. Ibid., p.43

The conclusion of the Senate Subcommittee on Oversight of Government Management is, in itself, perhaps the best answer to your question. The Subcommittee recomended that:

> (1) The SSA immediately discontinue all Bellmon Review activity;
>
> (2) The SSA stop all managerial administrative, and policy-related activity directly or inderectly aimed at influencing the ALJ´s allowance rates;
>
> (3) the Judiciary Committees of the House and /or Senate review the propriety and legality of the SSA´s actions regarding ALJ productivity. (see S. Prt. 98-111 at p. III,IV)

The most important finding of that subcommittee was that "SSA is **pressuring its ALJs to reduce the rate at** which they allow

disabled persons to participate in or continue to participate in **the Social Security disability program."** It further found that **"the SSA is imposing this pressure through several** means **including the inequitable and unjustified targeting** of only **allowance decisions and high allowance judges for review** pursuant **to an ammendment sponsored by Senator Henry Bellmon** and passed in **1980 (Bellmon Review), and the use of minimum production quotas and productivity goals.**

Approximately six months later, on March 24, 1984, at Hot Springs Arkansas a joint hearing before the Subcommittee on Social Security of the Committee on Ways and Means of the House of Representatives, and the Special Committee on Aging of the United States Senate was held. At this hearing, Judge David T. Hubbard of the Office of Hearings and Appeals, SSA, Fort Smith Arkansas related his personal experience with the Bellmon review. Testifying that pursuant to a 1982 decision by then Commissioner Louis B. Hayes, he received a letter from the Chief Administrative Law Judge advising him that he would be expected to undergo "peer counseling" to be conducted by the Deputy Chief Judge and the Regional Chief Judge. This was pursuant to a program which would serve to advise ALJ´s of their "decisional weaknesses" and provide a "mechanism for long-term imporvement." If "improvement" did not occur within a certain time table "other action would be taken." Judge Hubbard retained private counsel as he believed that this was the start of a process to both change his decisions, and eventually remove him from office (see S. Hrg.98-773 Part 3, at p. 286).

Interestingly, the architect of this "feedback" system was none other than Louis B. Hayes (the very same individual who now proposes to hold telephone hearings on Medicare claims). Mr. Hayes, in his Senior Executive Service performance plan was expected to implement a policy which would result in "some reduction in the ALJ allowance rate." This is contained in his performance plan from October 1, 1982 to September 30, 1983 (Ibid., at p. 287).

At approximately the same time as Judge Hubbard was being subjected to the "feedback" program, this Association brought suit agains the Secretary of HHS in the United States District Court for the District of Columbia. After protracted pre trial litigation and a trial which spanned several weeks, Judge Green found that the allegations raised by the judges, were in fact true. Essentially she reached the same conclusion as Senators Levin and Cohen.

> ... the evidence as a whole, persuasively demonstrated that defendants retained an unjustifiable preoccupation with allowance rates, to the extent that ALJs could reasonably feel pressure to issue fewer allowance decisions in the name of accuracy.

> While there was no evidence that an ALJ consciously succumbed to such pressure, in close cases, and, in particular, where the determination of disability may have been based largely on subjective factors, as a matter of common sense, that pressure may have intruded upon the factfinding process and may have influenced some outcomes.
>
> ...
>
> In sum, the Court concludes, that defendant's unremitting focus on allowance rates in the individual ALJ portion of the Bellmon Review Program created an untenable atmosphere of tension and unfairness which violated the spirit of the APA, if no specific provision thereof. Defendants' insensitivity to that degree of decisional independence the APA affords to administrative law judges and the injudicious use of phrases such as "targeting", "goals" and "behavior modification" could have tended to corrupt the ability of administrative law judges to exercise that independence in the vital cases that they decide.
>
> Association of Adm. Law Judges v. Heckler, 594 F. Supp. 1132, at pgs 1142 &1145 (1984)

Unfortunately, Judge Green did not enjoin these actions as, she believed that SSA had "shifted their focus, obviating the need for injunctive relief."

Given this history of abuse of the APA by the Social Security Administration over a period of over nine years, the numerous Congressional investigations resulting in the same findings, the decisions of Courts resulting in the same findings, and yet to date no action taken to stop the abuse, can there be any doubt that the APA has no mechanism for enforcement of its provisions? Frankly it is incomprehensible that anyone still believes the APA provides adequate protection!

Those who oppose the Corps concept alleging that expertise will be lost are rallying around an issue without merit. The bill specifically provides for the formulation of divisions headed by a judge who has expertise in that specific area of administrative law [Section 584(c)(1)] The assignment of judges to a division "shall be made after consideration of the areas of specialization in which the judge has served" [Section 584(a)]. The bill further provided that the Council shall consult with the agencies to formulate both initial and continuing educational programs to "assure that each administrative law judge assigned to hear cases of an agency has the necessary training in the specialized field of law of that agency" [Section 585(d)(12)]. There are also provisions for similar arrangements for continuing education of other employees to assure that the level of expertise in the division is maintained [Section 585(d)(13)].

My prepared remarks submitted prior to the July 21, 1987 hearing dealt at length with the cost-effectiveness of this system and for the sake of brevity, I do not feel I need repeat it. However, I should like to remind the Subcommittee that my home state, New Jersey, was one of the first to utilize the unified corps system. Reports submitted to this Subcommittee by Chief Judge Ronald Parker in connection with the May 1986 hearings constitute proof positive that the system saves money. In fact, all eleven states that have instituted this system have had the same experience.

Your third question can be answered quite simply. One cannot reconcile the role of an administrative law judge as the "concience of the agency" and an impartial arbiter.

Senators Cohen and Leven, in their 1983 report concluded that:

> "(t)he ALJ is the only impartial, independent adjudicator available to the claimant in the administrative process and the only person who stands between the claimant and the whim of agency bias and policy. If the ALJ is subordinated to the role of mere employee, an instrument and mouthpiece for the SSA, then we will have returned to the days when the agency was both prosecutor and judge. The system of administrative law as we know it is a product of much thoughtful consideration and concern for competence and fairness. One key to this process is the ALJ, and, the integrity of the position must therefore be protected." (S. Prt. 98-111, at p. 38)

Similarly Mr. Justice Goldberg, speaking to the Federal Administrative Law Judge Conference on May 12, 1984 stated that as long as the ALJ´s are beholden to the employing agency for anything, their impartiality is suspect and impaired, and so long as the ALJ sits in a courtroom with the seal of the Agency over his head he cannot be impartial.

I submit, Mr. Chairman, that the only way to insure that the that the ALJ be an "impartial arbiter" is to enact the "Administrative Law Judge Corps Act."

The issue of an Article I court first came to light in 1981 and was touted as a "solution" to the crush of Social Security claims in the U.S. District Courts. In reality it is an attempt to maintain the status quo, and to have appellate judges on the side of the agencies. Further it is intended to stem the tide of decisions from the current Courts of Appeal which are in large measure favorable to the claimants. It does not deal in any way with the problems faced by the administrative law judge. In fact, the ALJ, under this proposal, remains in the employ of the Social Security Administration. Further, there is no provision for preventing the abuses heretofore described. An Article I court may relieve the burden of Social Security cases now borne by the District Court judges, but at what expense. All the judges of such a court would be political appointees subject to reappointment after a specified term of years, and thus subject to the political tide of the era during which they serve. The administrative law judges would still be employed by SSA and subject to the same pressures which we have been experiencing for nigh on a decade. The public would be ill served by the enactment of this proposal. Should S. 950 be passed, there would be no need for an Article 1 Court. It is my firm belief that once the judges who hear Social Security cases are no longer employed by that agency, the number of decisions appealed to the District Court level will decrease substantially, thus reducing the burden on District Court judges. There will be no need to deprive claimants of the right to appeal to a life tenured independent judge.

In addition to reducing the District Courts´ burden in Social Security cases, this bill provides a little known mechanism which will reduce that burden in other areas. Section 588(d) makes the Corps available for use by any court where the special expertise of the ALJ would be useful. Thus, a District Court judge could refer pre-trial proceedings in such complicated matters as multi-party SEC litigation or labor matters to an ALJ rather than a Magistrate. Thus the ALJ´s special expertise could be put to use to assist the District Court judge in promptly disposing of the pre-trial motion problems in such cases, freeing both the Magistrates and the Judges for the criminal calendar and other civil matters.

With regard to your question concerning the removal of Medicare matters from consideration by SSA ALJ´s, the real issue is not what impact this will have on the judges (since it will have little if any) but rather what impact will it have on the public. As this Subcommittee has already heard, HCFA intends to establish a hearings unit staffed by GS14 (and some GS15) ALJ´s to conduct 75 per cent of these hearings by telephone. These judges would be given offices within the HCFA offices and would have their clerical and secretarial needs fulfilled by existing HCFA employees. There will be few if any face to face hearings, for this would entail having a judge travel to the claimant´s area of residence at great expense to the government. In these times of government attempts to reduce expense, one wonders how Dr. Bowen can justify hiring some 42 new judges to handle only these cases, employ them in Baltimore, and then pay the enormous expense of hearing facilities, travel (hotels and meals for the judges), and the hiring of temporary clericals at the hearing sites, when there are already 650 trained ALJs who have been handling these cases for years, at 139 hearing sites close to the homes of most claimants, **ready, willing, and able,** to hear these cases. And what of the cost for training these new judges? One HFCA representative was recently qouted as saying that there was a need for judges with special expertise in this area. Did that gentlemen really understand the import of this statement? In essence he was saying that we SSA judges, who are highly trained in medicine and have been hearing these cases for years (and understand the law and regulations) are not competent. I take that as a personal insult.

The public must also look at the individual behind this new plan to deny them of face to face, local, hearings. The architect of this proposal is non other than Louis B. Hayes, the very same Louis B. Hayes, whose SES performance plan called for a reduction in ALJ reversal rates. Consider this, in combination with the fact that there will be no visual way to assess credibility of the witnesses, and the fact that the judges will by under his thumb in Baltimore. It does not take long to come to the conclusion that the object is a reduction in the number of decisios favorable to the claimants.

In answer to your last question, there was some concern that if the Corps bill passed, the Social Security Administration would remove its matters from ALJ consideration. The former versions of this bill did not have sufficient protection built in to prevent such actions. However, the current version has language which will effectively prevent any agency from engaging in such conduct. Section 588 (a) specifically states that:

> "All types of cases, claims, actions and proceedings heretofore held before administrative law judges shall be referred to the Corps."

Additionally, Congress can assure the continued use of the Corps by making provisions in new legislation for the assignment of cases to the Corps. Thus, agencies would be unable to avoid having matters of controversy involving them from being heard by the ALJs assigned to the Corps.

I trust that these responses have shed some additional light on the problems facing the administrative judiciary. Should you or any of the other Subcommittee members wish any additional information, I would be pleased to assist. In closing, I again thank you for the opportunity to testify in this matter.

Respectfully submitted,

Joyce Krutick Barlow

JOYCE KRUTICK BARLOW
U.S. Administrative Law Judge
Director, Reg. II, Chair, Comm. on
Legislation

ANSWERS TO
SENATOR HEFLIN'S QUESTIONS
BY JUDGE O'BYRNE

1. OPPONENTS OF THE INDEPENDENT CORPS OF ADMINISTRATIVE LAW JUDGES STATE THAT THE CURRENT PROVISIONS OF THE ADMINISTRATIVE PROCEDURE ACT (APA) ARE SUFFICIENT TO PROVIDE THE NECESSARY PROTECTION FROM UNDUE AGENCY INFLUENCE. YOU OBVIOUSLY DISAGREE WITH THIS STATEMENT. WHY?

The outright flouting of the spirit or of the provisions of the Administrative Procedure Act (APA) is not prevented by the existence of the APA. The APA is not self-enforcing and was not really framed to protect Administrative Law Judges (ALJ's). The main thrust of the APA was the protection of the due process and fair hearing rights of those appearing before an Administrative Tribunal. Officials of the Office of Hearings and Appeals (OHA) of the Social Security Administration (SSA) were fond of telling its ALJ's that the APA protected claimants and not ALJ's.

Enforcement of the APA requires a party to bring a court action to void a decision(s) upon an appeal and that often means the case is returned to the agency for reconsideration. A court might enjoin an offensive practice, but that remedy is expensive to obtain and can be an illusion.

Because of the lack of education of many Social Security claimants, they would not know when their due process rights were being violated and if they suspected something was wrong, would not have the resources to appeal to the courts. The only one who would know would be the ALJ that took shortcuts to increase the number of cases closed for that month. The Appeals Council rarely has a transcript of the testimony before it and would not know that hospital records, or the like, should have been obtained by the ALJ before a decision was reached. Therefore, it is vital that the ALJ's be independent of SSA influence, direct or indirect, in matters having to do with the development of the evidence before and after the hearing and that the record be fully developed during the hearing. The average claimant never heard of the APA. The Congress has placed the responsibility of providing a fair hearing on the ALJ's and we have fought to uphold that trust.

The Association of ALJ's v. Heckler, 1132 D.C.C. 1984, case was filed to enjoin certain practices of the SSA that directly or indirectly impacted upon the due process rights of claimants. In part, the court said that practices of the SSA "created an untenable atmosphere of tension and unfairness which violated the spirit of the APA... Defendants' insensibility to that degree of decisional independence the APA offers to ALJ's and the injudicious use of phrases such as "targeting" "goals" and "behavior modification" could have tended to corrupt the ability of ALJ's to exercise that independence in the vital cases they decide..."

After the Association incurred about $500,000 in legal fees, significant other expenses, and after establishing its case for an injunction, the court did not grant the relief sought. The injunction was not granted because the SSA advised the court it would be good and mend its ways. The court has yet to rule on the Association's petition for fees under the Equal Access to Justice Program. The APA enabled us to get into court, but the remedy sought escaped. "Goals" are now back at the SSA in spite of this court's admonition and in spite of the "Bono" settlement. The APA was little help here.

A heavy burden is placed upon the ALJ's of the SSA. The ALJ is to protect the rights of the claimant, protect the trust fund, and sit between the claimant and the SSA as Judge. The unrepresented claimant requires special care. We are charged with developing the evidence for the claimant as if we were claimant's counsel, develop the record for the SSA as if we were the SSA's counselor sit in the middle as Judge, and do so in a non-adversarial manner.

We secure hospital records, medical reports and other pertinent documents prior to a hearing if we know of their existence. We order medical examinations prior to a hearing and decide if expert or vocational witnesses are needed at the hearing. We must be aware of the medical and legal issues to be raised at the hearing so that an informative Hearing Notice can be provided to the claimant. During the hearing, we must conduct a combination hearing and discovery deposition. At the close of the hearing, further posthearing development may be required and ordered by the ALJ.

When all is done, the ALJ issues a reasoned decision with findings of fact and conclusions of law.

While the ALJ has a legal and moral obligation to do all of the above, the ALJ is almost totally dependent upon the SSA to accomplish these functions. All of these functions involve due process and whether the claimant will receive a fair hearing. Therein is the heart of the problem for which the APA has no answer. In most of our offices, the staff and Attorney Advisors that carry out these functions are not supervised by the ALJ responsible for the case. Due process is placed in peril.

The clericals and Attorney Advisors have Performance Standards. If they do not meet certain numerical standards, they can be denied a salary step increase. The SSA cannot manage the ALJ's directly, so it overmanages the office staff. Each Attorney Advisor must draft 1.5 decisions per day. Every member of the support staff in the office has some numerical goal, except the ALJ's. The result is constant pressure on the ALJ's to "produce" so that the office staff can meet their goals. The APA has no answer for this.

The constant pressure on ALJ's and the office staff for "production" is a real threat to fair hearings. Every time an ALJ consciously or unconsciously cuts short or eliminates pre-hearing development, decides not to call in expert witnesses, conducts a minimal hearing, eliminates posthearing development, the due process rights of the claimant or of the SSA have been violated. The APA is silent on this subject. The claimant would not know his rights were violated.

Because of the push for numbers, clericals, typists, and Attorney Advisors have come to resent conscientious Judges that insist upon performing more than "good enough."

Attorney Advisors resent having to rewrite a decision for an ALJ. It counts as but one decision. The ALJ is concerned because the Attorney Advisor may not make the 1.5 per day and may just sign the decision.

The SSA says an ALJ does not have to sign any decision that does not meet that ALJ's standards. The ALJ can always draft the decision. Judge Goodman of North Carolina did just that. He drafted all of his own decisions. The SSA brought a removal action against him for "low production." He was exonerated upon an appeal. His legal fees were crippling. The APA does not prevent this type of harassment.

A few examples of influences upon ALJ's never contemplated by the framers of the APA.

> An assistant to the then Director of the OHA came to Region V and told the assembled Hearing Office Chief ALJ's (then called Administrative Law Judge In Charge) that all ALJ's would be on the street in a year, looking for work unless we closed 26 cases per ALJ per month.
>
> An ALJ was called to Washington and advised if his office did not reduce its allowance rate, the office could be closed. The word was not to deny any particular case, but to deny more cases.
>
> The ALJ's were urged to conduct a hearing on a pending application without obtaining prior closed files of that claimant, to speed up the hearing process. A prior medical file with new medical data could result in a reopening of the prior application and the payment of past, as well as future benefits. Also, the prior file could result in the pending application being dismissed or result in a denial based upon the prior evidence.

ALJ's have been criticized for drafting decisions that were too long. The typists were complaining. The Judges were told by non-attorneys what the content of their decisions should contain.

ALJ's were advised that if a current SSA Policy Statement was in conflict with a SSA Regulation that the Regulation should be ignored and Policy Statement followed.

Attorney Advisors have refused to redraft decisions of ALJ's. The tail wants to wag the dog.

There is no area of an ALJ'S work at the SSA-OHA that some manager has not attempted to control directly or indirectly. Amending the APA is not the answer. An independent Corps of ALJ's insulated from influence is the answer.

2. THE MAIN CONCERN OF THOSE WHO ARE SKEPTICAL OF THE CORPS CONCEPT IS THE POTENTIAL LOSS OF EXPERTISE OF ADMINISTRATIVE LAW JUDGES. HOW DO YOU FORMULATE A CORPS THAT MAINTAINS THE NEEDED EXPERTISE WHILE PROVIDING AN EFFICIENT AND COST-EFFECTIVE SYSTEM?

The "expertise" developed as a trial lawyer is the most important "expertise" an ALJ will require. That is why the selection process, based on research, for ALJ's places so much weight on trial experience. A knowledge of the activities of an industry OR of medical matters is helpful in developing a line of questioning. Article III Judges hearing an arcane matter will rely on briefs and research in developing an opinion. An ALJ can do the same to remedy any lack of particular knowledge.

Certainly, the more often a particular type of case is heard, the less research will be required. An ALJ Corps would not change the basic fact that the hearing offices should be a Judge first and secondly be an expert. Judicial demeanor, the examination, cross-examination, knowledge of the rules of evidence, the handling of objections and motions, and the ability to write a sound decision, Judging, is the stock in trade of a Judge. The skill of a Judge is in judging.

However, the concerns of those honestly worried about the loss of "expertise" in a Corps of ALJ's could be handled as follows:

The Chief Judge of the Corps of ALJ's as a designated ALJ should, along with regular duty, act as a continuing Legal Education Director of the Corps. The primary duty of that office would be the training of newly hired ALJ's, refresher training for ALJ's who had been away from a particular area of the law, continuous legal education of the entire corps, and training for ALJ's moving from one division to another.

This Director should maintain a list of ALJ's with the ability to move into one or more divisions as needed. If there are no ALJ's on duty with sufficient expertise to quickly become productive in a given division, training should commence at once to establish a back-up group of ALJ's for that division or area of hearings.

Upon the establishment of a a Corps of ALJ's, an immediate and detailed survey of all ALJ's then on duty should be made:

A. to determine judicial expertise acquired as an ALJ in other agencies, some ALJ's have had a year or years of experience in agencies other than the agency where they are now assigned and could quickly assist another division.

B. to determine legal expertise of ALJ's that have served as counsel appearing for litigants before an agency or agencies in Administrative Hearings and for ALJ's who have served as counsel for an agency or agencies. There are ALJ's on duty that are very familiar with the work of agencies other than the agency where they are presently assigned. With minimal refresher training, these ALJ's could move into areas where they were expert in the past.

C. to determine what ALJ's now on duty would be interested in developing a knowledge of the work of other agencies. These ALJ's would provide the pool for training in areas where they have an interest.

D. to determine the identity of ALJ's that would prefer to continue in their present realm of expertise. These ALJ's should be left in the area where they now function, short of a dire emergency.

E. to determine the anticipated retirement date of all ALJ's on duty. This information would assist the Director in determining the future needs of the Corps in each division and whether recruitment of new ALJ's is or will be needed.

F. to determine what training newly hired ALJ's will need to serve the present or future needs of each division.

The Director should contact each agency sending cases for hearing to the Corps quarterly to determine future anticipated caseloads or anticipated caseloads because of new legislation. This information would assist the Chief ALJ of the Corps in determining future staff and ALJ needs.

All newly hired ALJ's shall be given whatever training is needed for them to function in the division to which they will be or are assigned.

The undersigned assumes that continuing legal education in all divisions will be constant as change is constant.

Using the outline above, expertise would not only be maintained but enhanced and would be as efficient and cost-effective as the present system. The Corps would be constantly developing a reservoir of expertise to be applied as needed. The ALJ Corps would be able to mine the jewels of expertise now buried. The ALJ with the Social Security Agency with 14 years of admiralty experience cannot use those years of experience with the SSA. In a Corps, he could be effectively used in two or more hearing areas.

3. MANY PERCEIVE ADMINISTRATIVE LAW JUDGES AS AN EXTENSION OF THE AGENCY WHICH EMPLOYS THEM. HOW DO YOU RECONCILE THE ROLE OF AN ADMINISTRATIVE LAW JUDGE AS THE "CONSCIENCE OF THE AGENCY" AND AN IMPARTIAL ARBITER?

I'm uncertain what is meant by "conscience of the agency", although there have been times that a conscience was needed. The Association of ALJ's has brought court action as a matter of conscience and such activity is very time-consuming and costly. In one action brought in Chicago, the Seventh Circuit found the ALJ's did not have standing because the ALJ's did not sustain a money loss. D'Amico et. al v. Secretary, 698 F. 2nd 903, 1983. In the Seventh Circuit, the ALJ's could not contest a Policy Statement that was in violation of a Regulation of the SSA.

I do not consider myself to be an extension of the agency that employs me. I do consider myself to be a conscientious arbiter (Judge) of the issues that come before me. The SSA may perceive the ALJ's as employee extensions, but I do not know any ALJ that perceives himself/herself in that light. That is the problem. We consider ourselves to be Judges and the SSA sees us as employees.

The very nature of my position requires that I not be a team player. Hostility on the part of the agency employing the ALJ is inevitable. For the most part, I decide issues between my employer and a claimant. My employer has twice found the claimant not to be entitled to benefits before that claimant appears before me. During one class for newly hired ALJ's, they were informed that the SSA had made a study of state agency decisions and said decisions were found to be 97 plus percent correct, the inference being the employer was correct 97 plus percent of the time in cases that would appear before them. An employee extension, a team player, might be inclined to go along. The ALJ's as Judges did not join the team.

A Corps of ALJ's would insulate ALJ's from this sort of influence from an agency. The total loss of influence, the loss of that employee-extension is the reason that agencies will or have opposed the creation of a Corps of ALJ's.

ALJ's consider themselves to be closer to the Judicial Branch than to the Executive Branch. The agencies know this. The SSA, in particular, was unhappy when Congress changed our title to ALJ from Hearing Examiner.

4. THE ADMINISTRATION IN THE PAST HAS ADVOCATED THE CREATION OF AN ARTICLE I COURT TO HEAR SOCIAL SECURITY CASES.

IS THIS THE PROPER RESPONSE TO THE PROBLEMS CURRENTLY BEING FACED BY SOCIAL SECURITY CLAIMANTS?

An Article I court is not the proper response to the problems facing Social Security claimants. For example, HR 4647 introduced on April 21, 1986 provides, in part, for a Social Security court and would be a disaster for claimants. Hearing Offices instead of ALJ's would hear cases. They would not be required to be lawyers. They would not have what protection the APA provides. The protection afforded claimants at the hearing level by ALJ's appointed under Section 3105 of Title V would be gone.

An Article I court would establish uniformity of entitlement status across all Circuits. However, an Article I court is not needed to solve that problem. Congress could provide that splits in the Circuits in regard to Social Security programs be resolved by a particular Circuit Court.

The proper response for the problems of claimants seeking benefits under entitlement programs is an independent Corps of ALJ's. A new and huge legal bureaucracy is not needed.

5. IN TESTIMONY RECEIVED HERE TODAY, IT HAS BEEN STATED THAT THE HEALTH CARE FINANCING ADMINISTRATION ASSUMES RESPONSIBILITY FOR MEDICARE PART B APPEALS ON OCTOBER 1, 1987, AND PART A IN 1988. WHAT IMPACT, IF ANY, WILL THIS HAVE ON SOCIAL SECURITY ADMINISTRATIVE LAW JUDGES?

The SSA ALJ's would simply be out of the picture. We would not hear Health Care cases. At a time when events are moving us toward a Corps of ALJ's, it is unwise to create another new and separate group of ALJ's.

Parties litigating Health Care claims are obviously afraid of the officials that will manage and direct this new group of ALJ's. When some of these folk were with the SSA, they caused a lot of heartache, brought on our Association lawsuit, and brought on several class actions. They have been remembered.

Claimants presenting Health Care claims with the ALJ's of the SSA in the past feel they were fairly treated and want to stay with the ALJ's of the SSA.

6. ONE OF THE CRITICISMS OF THIS BILL HAS BEEN THAT AGENCIES WILL SIMPLY NOT USE THE ADMINISTRATIVE LAW JUDGE CORPS IF IT IS SET UP AS AN INDEPENDENT AGENCY. WHAT HAS BEEN YOUR EXPERIENCE IN THAT AREA? IS IT POSSIBLE FOR THE AGENCIES TO MAKE AN END RUN AROUND THE ADMINISTRATIVE LAW JUDGES -- ARE THERE OTHER ALTERNATIVES FOR THE AGENCIES TO ACCOMPLISH THEIR GOAL OTHER THAN THROUGH THE ADMINISTRATIVE ADJUDICATIVE PROCESS?

I would postulate that some agencies, to the extent that their governing statute has an exemption power, are already considering ways to avoid the use of an ALJ Corps to resolve matters now being heard by ALJ's in their employ.

At present, there is a newspaper merger case in Detroit that required an ALJ as the presiding officer. For reasons unknown, the Department of Justice secured the services of a retired ALJ. The Federal Administrative Law Judge Conference suggested this was a violation of the law. The parties to the action then entered into an agreement stipulating to use of the retired ALJ.

Some ALJ's are involved in Rule Making and other hearings that are not legislated as APA hearings. These ALJ's feel that the agencies would not use an ALJ from the Corps for these matters.

To prevent agencies from evading the use of ALJ's, the final legislation could provide that all agencies or other branches of government that used ALJ's to hear testimony or receive evidence at any formal or informal hearing for any agency purpose shall continue to use ALJ's for those purposes. Any agency that has used an ALJ at any time within three years of the passage of this legislation must continue to do so. Failure to comply with this provision shall render the agency decision, rule, regulation, order or other action null and void.

Francis J. O'Byrne

Senator HEFLIN. All right, thank you. There is one other observation. A U.S. district court judge has to vary his expertise substantially.

All right. We will call on the next panel, panel two, Judge Mary Ellen Bittner, President of the Forum of Administrative Law Judges, here in Washington; Ms. Althea Simmons, the Director of the Washington Bureau of the National Association for the Advancement of Colored People, Washington, DC.

Judge Bittner, you are listed first, so if you will go ahead.

STATEMENTS OF A PANEL CONSISTING OF MARY ELLEN BITTNER, PRESIDENT, FORUM OF U.S. ADMINISTRATIVE LAW JUDGES, WASHINGTON, DC; AND ALTHEA T.L. SIMMONS, DIRECTOR, WASHINGTON BUREAU, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, WASHINGTON, DC

Judge BITTNER. Thank you, Senator. Can you hear me, Senator Thurmond?

Senator THURMOND. Yes.

Senator HEFLIN. It is not very good. Would you move it a little closer?

Judge BITTNER. I am an administrative law judge with the Drug Enforcement Administration and am President of the Forum of U.S. Administrative Law Judges, whose members are administrative law judges in 15 different regulatory agencies.

We appreciate the opportunity to appear here and the concern the subcommittee has demonstrated for administrative justice and the judges who implement it. As I am sure you know, S. 950 has both proponents and opponents in the administrative law judge community. The vast majority of Forum's members number among the opponents.

We oppose S. 950 because it would create a new bureaucracy which would do no good and may do substantial harm to the goal of fair and efficient administrative proceedings. Contrary to assertions of those in favor of this bill, a new agency comprising administrative law judges and support staffs is not necessary to preserve our decisional independence.

Although there have been intrusions upon the independence of administrative law judges at the Social Security Administration, those problems can and should be resolved by specific legislation designed to address them, not by separating all administrative law judges from the agencies whose cases they hear.

Judge Palmer's comment in his written statement that agencies regularly appear before the judges as party litigants is misleading, for it ignores the Administrative Procedure Act and suggests that the agency employee who tries the case has some control over the judge's decision, which is not the case.

The reality is quite the contrary, for the Administrative Procedure Act specifies that the ALJ may not be supervised by anyone who performs investigative or prosecutorial functions for the agency, and that no one who performs such functions may be involved in the agency's decision.

I would like to also address the argument made by some proponents of this legislation that the Department of Labor's difficulties in borrowing judges from other agencies demonstrates the need for a corps.

At least insofar as the loan of judges from the NLRB is concerned, the facts need to be recognized. Chief Judge Litt of the Department of Labor wrote to Chief Judge Melvin Welles of the NLRB in October 1985 asking for a meeting to discuss the possibility of borrowing on a nonreimbursable basis 10 NLRB judges for a 1-year detail to hear Black Lung cases.

A month later, Judge Litt wrote to Mr. Pettibone, the Assistant Director of OPM for Administrative Law Judges, asking for a nonreimbursable detail of the equivalent of 10 judge years from the NLRB.

The NLRB was ready to implement the details very soon after Judge Litt's request, but ran into a problem about whether they could appropriately be nonreimbursable. The NLRB officials were surprised that this was a problem because they had been advised by congressional and OMB staff that the Department of Labor had been given funding not only to hire but to borrow additional judges. Thus, the money for reimbursement was available.

The comptroller of the NLRB determined from his research that the agency could not lawfully use its appropriation to process Black Lung cases, a position which was affirmed by the Comptroller General, who concluded that it would be unlawful both for the NLRB to loan the judges and for DOL to borrow them unless there was reimbursement.

These problems were resolved and a draft contract for the details was ready for signature when, on April 3, 1986, Judge Litt wrote to Judge Welles stating that he had decided not to borrow NLRB judges after all. In the meantime, Judge Litt had received OPM approval to hire 12 new judges.

I would like to point out that this year the loan program was implemented and NLRB judges have heard 400 Black Lung cases since April. I think that this demonstrates that the loan program does work. If there is any problem with the program stemming from the reimbursement situation, as the NLRB emphasized in a letter to Senator Grassley last June, those problems can be remedied easily by providing an exception to the purpose rule, 31 U.S.C. 1301(a), which on its face prohibits applications of appropriations for objects other than those for which appropriations were made. This is obviously a far easier remedy to implement than creation of a whole new agency.

We must also take exception to the argument that specialized expertise is not necessary. Under S. 950, agencies would lose the right to establish procedural rules, and thus to manage their caseloads, as well as the right to have specialized judges with experience in their field hear the cases.

I would note that under the bill there is no requirement that judges be assigned first to cases within their own division.

I see that the red light is on. I would like to thank you for this opportunity to appear and to answer any questions you have.

[The prepared statement of Judge Bittner follows:]

STATEMENT OF THE FORUM
OF UNITED STATES ADMINISTRATIVE LAW JUDGES
IN OPPOSITION TO S. 950

Introduction

The Forum of United States Administrative Law Judges is an organization of administrative law judges in approximately 16 federal agencies. Our principal purpose is furtherance of the public interest in improving the administrative process. In our view, creation of a separate unified corps of federal administrative law judges would be inimical to the fair and efficient functioning of administrative proceedings.[1]

I. The Provisions of S. 950

S. 950 would place all of the more than 1000 federal administrative law judges in a new agency designed to hear cases assigned to it by other federal agencies such as those which currently employ administrative law judges. The administrative law judges would be grouped in one of from four to ten divisions, each of which will hear cases in certain legal specialties; assignment of a judge to a specific division would be made "after consideration of the areas of specialization in which the judge has served."

The corps would have a chief judge who would be appointed by the President with the advice and consent of the Senate. Each division would also have a chief judge; the chief judge of the corps and the division chief judges would constitute a Council of the Corps which would be the policymaking body of the agency. The initial group of division chief judges would be appointed by the President with the advice and consent of the Senate. Subsequent division chief judges would be appointed by the chief judge of the corps with the approval of the Council.

The Council's authority includes, inter alia, the power to assign judges to divisions and transfer or reassign them from one division to another, to abolish, create or reconstitute divisions of the corps, to appoint judges, and to prescribe rules of practice and procedure for the conduct of proceedings before the corps, except that the Council could not for two years revise rules that have been prescribed by agencies prior to enactment of S. 950 without the approval of the affected agency. The Council also would have the authority to take adverse actions against administrative law judges.

II. The Purported Advantages of a Corps

A. The Actual and Perceived Independence of the Federal Administrative Judiciary

1. Administrative Law Judges' Independence from the Agencies Whose Cases They Hear

Proponents of a corps argue that placing federal administrative law judges in a separate agency would make them more independent, since they would no longer be employed by the agency which conducts the investigation and prosecution of the cases and would not be housed with other agency personnel. In our view, this argument misconstrues the true nature of judicial independence and addresses a non-existent problem.

The independence of administrative law judges, vis-a-vis the agencies, means freedom to find facts, make a decision based on the judge's best assessment of the record in the light of agency policy, and render decisions without fear of retaliation or discrimination in any form because of the decision reached. The importance of these freedoms is recognized in the Administrative Procedure Act, 5 U.S.C. 551 et seq., which applies to the vast majority of cases heard by administrative law judges. Thus, the Administrative Procedure Act requires that an administrative law judge may not consult a party on a fact in issue unless all parties are notified and given an opportunity to participate in that discussion, that an administrative law judge may not be responsible to or supervised by someone who performs investigative or prosecutorial functions for an agency, and that any agency employee who is engaged in such functions in any case may not be involved in the agency's decision or review of that case.

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[1] Although the vast majority of our members are opposed to this bill, a small minority of members are in favor of a unified corps of administrative law judges.

Also importantly, the Administrative Procedure Act provides that administrative law judges may be removed only for good cause. Their classifications and pay are established by the Office of Personnel Management and not by the agencies which employ them. In addition, administrative law judges are separated from other agency personnel, are assigned cases in rotation insofar as practicable, and must make their decisions on the record. Further, they may disqualify themselves from cases where they believe they have a potential conflict of interest and are protected from assignment to other agency duties. These aspects of the status of administrative law judges are critical to their independence in making decisions.

Additional protections have been included by Congress in several other enforcement programs. Thus, the National Labor Relations Act requires strict separation between the NLRB General Counsel and the five-member Board, its staff, and the administrative law judges. The National Transportation Safety Board, the Federal Mine Safety and Health Review Commission, and the Occupational Safety and Health Review Commission all have separate corps of administrative law judges who make final decisions subject only to appellate review by the Commission or Board. With respect to OSHRC and FMSHRC the review is discretionary. Indeed, an indication of the trust and high regard with which Congress views the administrative law judiciary is that FMSHRC is required to apply the same standard in reviewing its administrative law judges' decisions that the courts traditionally apply to the Commission. Thus, findings by the Commission's trial judges are final and conclusive if supported by substantial evidence.[2]

Proponents of S. 950 refer to the fact that agencies provide administrative law judges with office space and facilities as indicative of the judges' dependence on the agencies. However, the agency personnel who make the decisions regarding these matters report to the agency heads who set the substantive legal precedents which the administrative law judges follow. Just as federal district and appellate court judges do not establish their own budgets and make definitive determinations of what office space and equipment they will use, neither do federal administrative law judges. In both instances, judges are dependent on the decisions of others, whether agency heads or chief judges or Congress, with respect to these aspects of their working conditions.

Proponents also cite the determination of the Social Security Administration to control the volume of decisions and their outcome for the proposition that federal administrative law judges are subject to an inappropriate degree of control by the agencies. However, this is the only example of such a problem mentioned in various statements in support of a corps, and we know of no others. We submit the legislation fashioned to meet the discrete needs of the Social Security Administration administrative law judges is a more appropriate and measured response to the problem than enactment of legislation that would, with no real justification, completely dissociate all agencies from the administrative law judges who hear cases arising under the statutes the agencies were created to administer.

2. The Perceived Independence of Administrative Law Judges

Proponents of a corps cite a perception among litigants that an administrative law judge employed by the agency prosecuting the case cannot be impartial as the persuasive reason for supporting establishment of a corps of federal administrative law judges. However, aside from widespread complaints of agency intrusion on the decisional independence of judges at the Social Security Administration, there is no evidence of public, legislative, or judicial concern over the fairness of the administrative process afforded by federal agencies. Indeed, in April 1985 the Council of the American Bar Association's Section on Administrative Law passed a resolution opposing establishment of a government-wide corps of administrative law judges. Further, at its 1985 Annual Meeting the Council of the ABA Section of Labor and Employment Law, a group composed of both management and union labor law practitioners, unanimously passed a resolution opposing establishment of a corps of administrative law judges. If there were any real indications that administrative law judges are not independent of the agencies whose cases they hear, the attorneys who practice before the agencies would have been the first to seek changes in the present system.

Decisions of the Supreme Court and the federal courts of appeals have recognized the fairness of the present administrative process and the adequacy of the protections afforded by the Administrative Procedure Act. See, for example, Butz v. Economou, 438 U.S. 478 (1978); Marshall v. Jerrico, 466 U.S. 238, 250 (1980); NLRB v. Permanent Label Corporation, 657 F.2d 512, 527-528 (3d Cir. 1981); Nash v. Califano, 613 F.2d 10 (2d Cir. 1980); Benton v. United States, 203 Ct. Cl. 263, 488 F.2d 1017 (1973).

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[2] Chacon v. Phelps Dodge Corporation, 709 F.2d 86, 90-92 (D.C. Cir. 1983).

B. Efficient Use of Administrative Law Judges

Proponents argue that establishment of a corps of administrative law judges will result in increased efficiency and flexibility in the assignment of administrative law judges to cases, on grounds that (1) current programs under which administrative law judges are loaned from one agency to another are not successful, and (2) the establishment of a corps of administrative law judges will permit case assignments to be adjusted so as to respond to the various peaks and valleys of individual agency caseloads.

It is frequently less efficient, in terms of achieving initial decisions which reflect an understanding and knowledge of the relevant facts and legal principals at issue, for judges experienced in one area of the law to hear cases in another. The price of this decreased efficiency is measurable not only in the costs to agencies but in the increased time necessarily spent by attorneys, who must prepare longer and more detailed briefs and arguments to persuade inexperienced judges.

It is true that less complicated administrative proceedings can be efficiently handled by transferred judges. It is also true that some agencies require the services of administrative law judges only sporadically, while others find that temporary decreases in their caseloads enable them to make some of their administrative law judges available to hear other cases. The existing loan program administered by the Office of Administrative Law Judges within the Office of Personnel Management is meeting the needs of agencies in both categories.[3]

Indeed, the Office of Administrative Law Judges has revised the procedures for the loan program and is also encouraging agencies to establish standard financial agreements to facilitate the processing of requests for loaned judges. It should also be noted that under recent legislation the Office of Administrative Law Judges can make retired administrative law judges available to hear cases when needed. We believe that the efforts being made to revise and update the present system are successful, and that there is no need to establish a whole new bureaucratic structure to facilitate temporary transfers.

C. Efficient Use of Facilities and Support Personnel

Proponents of S. 950 urge that establishment of a centralized corps would result in significant savings to the taxpayers because it would avoid the necessity of various agencies duplicating each other in the purchase and maintenance of case docketing and tracking systems, preparation of reports for Congress and the public, and the expenses of support personnel. However, the proponents have offered no supporting data for the assertion that establishment of a new federal agency would result in decreasing the net cost of administrative proceedings at the trial level. Indeed, consideration of the personnel, facility, and equipment requirements of a corps indicates that the contrary may be true.

First, establishment of a corps would entail the transfer to the new agency not only of administrative law judges, but of all support personnel as well. Thus, the new agency would need to be equipped as a full-scale bureaucracy, complete with secretaries, paralegals, clerks, and administrators. There are currently about 1000 administrative law judges; consequently, the total employee complement of the new agency could easily exceed 5,000.

Second, the approximately 650 administrative law judges who hear Social Security Administration cases are dispersed throughout the nation in more than 100 locations. Only a few of the administrative law judges who work for other agencies are located in the same cities. Therefore, the only judges readily available for merger under the same roof and with a single support staff are the approximately 200 administrative law judges located in Washington, D.C. Whether unification of these relatively few administrative law judges would result in any significant savings in the cost of office space, law clerks, libraries, docket clerks, travel offices, and hearing rooms is, at best, a matter of some conjecture.

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[3] See, 5 CFR Sec. 930.213.

Third, although there may be some duplication between agencies in the personnel and equipment required to support trial level administrative proceedings, agencies currently pay for some equipment and services which they share with administrative law judges, such as personnel departments, libraries, and travel offices. If the administrative law judges are placed in a separate corps, the new corps will have to supply this support, but, as the agencies will need to maintain their existing services whether the administrative law judges use them or not, the cost to the government of administrative proceedings will increase, not diminish.

D. The Potential for Improving the Quality of Administrative Law Judges

Proponents of S. 950 suggest that if federal administrative law judges are placed in a separate agency qualified applicants will be attracted by the prospects of more independence and hearing a greater variety of cases. These claims are illusory.

First, S. 950 actually diminishes the independence of administrative law judges rather than increasing it, for it grants the Council absolute power to create or abolish divisions and to transfer judges from one division to another. Thus, an administrative law judge can readily be transferred against his will to hear cases in a field of law in which he lacks expertise. Furthermore, the notion that qualified attorneys would be more likely to apply to become administrative law judges if there were a centralized corps does not take into account that many administrative law judges sought the position because it enables them to use the skills and expertise they have developed through years of practicing in a specialized field of law; if there is no assurance of hearing cases in that field, many of these highly qualified practitioners may be dissuaded from becoming administrative law judges.

Further, S. 950 provides that an administrative law judge may be involuntarily reassigned to a new permanent duty station by the Council, subject only to the requirement that the Council give the judge a written explanation that the reassignment is required to meet substantial changes in workloads. In addition, disciplinary actions, including removal, are initiated by this Council. It is especially significant that members of the Council are appointed by the Chief Judge, with the approval of the Council. Qualified applicants are not likely to be attracted to positions where there is no guarantee either that they will continue to work in their legal specialty or that they will not be required to uproot themselves and their families against their will.

Last, the purported attraction of hearing a greater variety of cases ignores the policy that certain types of matters should be adjudicated by administrative agencies with particular expertise in the subject matter and political accountability. Thus, this benefit, if it is one, can be achieved only by subverting the administrative process.

III. The Significance of the State Central Panels of Administrative Law Judges

Proponents of S. 950 suggest that the central panels of administrative law judges used in some states constitute a precedent for establishment of a similar system for federal administrative law judges. However, the comparison is not jusitified. Those states which adopted central panels previously had no guarantees of independence for administrative law judges comparable to those provided in the federal Administrative Procedure Act, and still fail to provide some of the more fundamental guarantees that exist in the federal system. For example, non-political merit selection, independence from agency advocates, insulation from agency determination of pay and disciplinary matters, and high standards of professional qualification for administrative law judges were not found in these systems before central panels were established (and to some extent not after they were established, either). The central panels in the states are relatively small, and in most states, despite their characterizations as central panels, do not embrace all of those within the state who perform administrative law judges' functions. In establishing central panels, the states are moving from conditions comparable to those which disappeared at the federal level 40 years ago, and still fail to provide all the protections necessary to guard independence which federal administrative law judges have long enjoyed.

IV. The Adverse Impact of a Corps on Administrative Proceedings

Establishment of a new federal agency comprising administrative law judges and support personnel is likely to have a substantial and adverse impact on federal administrative proceedings. Agencies which currently utilize administrative law judges are likely to resist creation of a new agency, and there is a possibility that some agencies will choose to lessen their use of administrative law judges as to those types of cases which do not require a hearing on the record under the Administrative Procedure Act. Significantly, S. 950 provides, as discussed above, that the Council shall have the power to prescribe rules of practice and procedure, a provision which nullifies the agencies' long-held authority to prescribe rules and time limitations appropriate for the kinds of cases they are commissioned by Congress to decide.

A wide variety of cases arising under numerous statutes are decided in administrative proceedings. The basis for the current system of administrative decision-making is that administrative agencies can develop expertise in a given subject and utilize that expertise in making governmental decisions relating to that subject. Many of the agencies which currently employ administrative law judges have traditionally preferred to hire judges who had considerable experience in the agency's legal specialty. However, there is no assurance that a corps of administrative law judges would preserve this expertise.

Under the current system, the agency head or his designee controls the agency's case docket, hires administrative law judges in accord with the anticipated caseload, and prescribes rules of procedure tailored to the types of cases which that agency is required to decide. If a corps of administrative law judges is established, however, agencies will necessarily lose all these powers. Many agencies, such as the National Labor Relations Board, the Occupational Safety and Health Review Commission, and the Federal Mine Safety and Health Review Commission, have as a primary function the hearing and deciding of cases arising under a specific statute. A substantial majority of the cases decided by the heads of these agencies come before them on exceptions to administrative law judges' decisions. If the agencies cannot determine how many administrative law judges will be assigned to their cases, they lose a significant part of their power to determine how speedily the statutes they implement will be enforced and to insure the efficiency of their operations.

Federal agencies must presently justify the numbers of administrative law judges they seek to employ in light of the mission of the agency and their projected caseload. This is an integral part of the agency's overall planning and budget process. The chief judge of a corps would be in a poor position to speak for other agencies on these matters. Thus, in order to determine staffing and other budgetary requirements of the corps, the chief judge must either engage in ongoing and extensive consultation with some 30 other agencies or act independently without the knowledge to act intelligently. In consequence, the budget process will necessarily become either more complicated or less accurate.

Conclusion

We urge the Committee not to recommend passage of S. 950. We recognize that there are serious concerns about the potential for agency intrusion upon the decisional independence of administrative law judges who hear cases for the Social Security Administration. However, these concerns can readily be met by discrete legislative solutions, without the necessity of establishing a separate agency to house all federal administrative law judges, and the other problems which such a corps would purportedly address either do not exist or are not likely to be resolved by creating such an agency.

The proponents of a corps have the burden of showing that creation of a new agency is needed and will improve the administrative process. They have failed to carry that burden and instead have proposed changes to the present system which would only make administrative adjudication more cumbersome than it is at present.

Mary Ellen Bittner

Mary Ellen Bittner, President
The Forum of United States
Administrative Law Judges

Senator HEFLIN. Ms. Simmons.

STATEMENT OF ALTHEA T. L. SIMMONS

Ms. SIMMONS. Thank you so much, Mr. Chairman. I am Althea T.L. Simmons, director of the Washington Bureau of the NAACP, a 78-year-old national membership organization with branches in 2,100 communities.

I appear before you today in behalf of that association because we represent a number of persons who use ALJ's. I will not take the time to make the case for ALJ's. I think that has been well documented. I will say that the NAACP, as late as 1979, went on record as asking for more ALJ's.

We oppose the creation of this new Federal bureaucracy because we believe it will politicize a procedure which must be both independent and impartial. I believe that the heart of the flaw of S. 950 is the political appointment of the chief judge, section 583, division chief judge, section 584, and the unchecked power of the Council in section 585.

The Administrative Procedure Act became law more than 40 years ago expressly to insulate decisionmaking from overbearing political influence on the decisionmaker. Although the APA, in the main, addresses such influences emanating from agencies, political influences from the Council can be just as devastating.

We have certain queries regarding S. 950 as follows: Why must the chief judge have been an ALJ for at least 5 years? Who protects the ALJ from the Council? Why trade specialization for generalists?

The NAACP believes that there is a definite need for expertise, and I can say, Mr. Chairman and members of the committee, that we know from bitter experience, having appeared before ALJ's who have been assigned from other agencies, that they lack the kind of in-depth expertise to understand the nuances that are ofttimes necessary in specific disciplines or areas.

I am speaking particularly with reference to the school desegregation cases. When you get a judge without the expertise, it is a case of trying to educate the judge who is hearing the case. We think that a lot would be lost if the specialization was not there.

The NAACP is also concerned that there is no mandate that cases be assigned to the corps. We note that same loophole in the APA, but we feel that the necessary correction is to amend the APA rather than adopt this bill.

We strongly support the APA's standard for removal of ALJ's for good cause. We note no provision in S. 950 for removal of a chief judge. We also do not understand, nor concur, with the provision that allows the Council to override the judgment of the peer review in subsection (f). Currently, the APA contains satisfactory, we believe, disciplinary procedures and we have seen or heard of no need for change.

The specialization needed to judge administrative actions has historically been given due deference by the courts, and the role of ALJ's is evolving, but we must be mindful that the final decision is agency action.

We do not quarrel with the need to tighten up the standards for agency review of an ALJ decision to the substantial evidence doctrine. A benefit at this stage in the administrative process is agency action.

We do believe that you could amend the APA Act, and we think that you possibly need to address the problem of the Social Security Administration ALJ's. But we think that if there is nothing in the bill that really keeps the chief judge from becoming a czar and shifting persons around among the divisions—as a matter of fact, there is nothing in the bill that says they cannot collapse such divisions or must assign persons based on specific expertise—you would lose the expertise which we feel is so necessary to our system of administrative justice.

There is a law review article written by Judge Zankel that we would like to incorporate by reference in our testimony. It is "A Unified Corps of Federal Administrative Law Judges Is Not Needed." It was published in the Western New England Law Review, volume 6, issue 3, at pages 723 to 744.

We generally subscribe to the observations and conclusions contained in that article. We would like to incorporate that by reference in our testimony.

We would urge this committee to give due consideration to, first, whether there is a need for a unified corps; second, what happens to the loss of expertise; third, what must be done in order to ensure that this new agency would not be completely politicized.

I have reread S. 950 a number of times and it is our considered opinion that this would be a political football, and we certainly urge you not to support this measure.

Thank you so much.

Senator HEFLIN. Without objection, the article that you mentioned will be made part of the record.

[Submissions of Ms. Simmons follow:]

TESTIMONY
OF
ALTHEA T. L. SIMMONS
DIRECTOR, WASHINGTON BUREAU
NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE

Mr. Chairman and members of the Subcommittee, I am Althea T. L. Simmons, Director of the Washington Bureau of the National Association for the Advancement of Colored People, a 78-year old national membership association with 2100 branches and youth units in the 50 states and the District of Columbia. I appreciate this opportunity to present the Association's views on this legislation.

The need for Administrative Law Judges is documented. Few people in their lifetime are involved in direct contact with the judicial process; most people will have direct involvement only with an administrative agency. When agency action occurs, whether by rule, order, license, sanction or relief, if a dispute arises the most expeditious resolution is by an independent and impartial hearing. To date, ALJs outnumber district court judges two to one and decide infinitely more cases. As early as 1979, the NAACP Convention passed a resolution calling for more Administrative Law Judges.

As regards this proposed legislation - S-950, we ask a seminal question: If the Administrative Procedure Act is working, why do we need this bill? The NAACP answer is that the APA is working, although amendments may be needed in discrete areas: a reform far short of the creation of yet another bureaucracy.

The Corps

The NAACP is opposed to creation of this new bureaucracy, an Administrtive Law Judge Corps, which inherently politicizes a procedure which must be both independent and impartial. At the heart of the fatal flaw in S-950 is the political appointment of the Chief Judge. Section 583, and division chief judges, Section 584, and the unchecked power of the Council in Section 585. The APA became law over 40 years ago expressly to insulate decision-making from overbearing political influence on the decision maker.

Although the Administrtive Procedure Act in the main, addresses such influence as emanating from agencies, political influence from the Council can be just as devastating. We have specific queries regarding S-950 as follows:

Powers of the Chief Judge and Council

The NAACP sees nothing in S-950, sections 584 and 585 to ensure the continuation of a particular division or standards to guide the Council regarding either creation or abolition of a division. We do not understand why a ALJ must have been in the federal system five (5) years before being eligible as division chief judge. We question the apparent power of the Chief Judge and Council over ALJs and fear the possibility of abuse which would affect the decisional independence of ALJs. In fact, our main query as regards this bill is who protects the ALJs from the Council.

Judicial Nomination Commission

The NAACP opposes this construct of politically appointed judges; however, we take judicial notice that our concern, raised in previous years, regarding the inclusion of a representative of the National Bar Association on the Commission, has been addressed in Section 586 of the bill.

Appointments, Compensation and Transfer of ALJs

The NAACP is on record calling attention to the abysmal affirmative action practices in the selection of ALJs. We called this to the Subcommittee's attention in 1979 and again in 1983. Today, as in 1979, few minorities or women are ALJs. Of the over 1,000 ALJs only approximately 50 are members of minority groups; approximately 50 are females. Clearly this aspect of the system must be reformed.

The ALJ - Specialist or Generalist

One of the most troublesome aspects of the ALJ Corps measure is the destructive impact it would have upon the level of expertise possessed by ALJs assigned to hear cases in a particular area of the law. Ostensibly the bill would preserve the level of ALJ expertise in specialized areas by establishing divisions in major areas of the law. We suggest that the divisions do not accomplish this purpose. Aside from the initial assignment of current ALJs to divisions, there is no requirement that ALJs be assigned to the division in which they possess expertise. Nor is there any requirement that the divisions listed in the bill be retained. Rather the divisions may be changed by the Council. In fact, some of the proponents of the unified Corps suggest it would be better if some of the divisions were eliminated and, if the ALJ Corps becomes a reality, that council action in this regard should be undertaken as soon as feasible. If such reasoning prevails then easily the expertise acquired over the years can be squandered leaving the public as the loser.

Our legal system, both judicial and administrative, is becoming increasingly more complex, and with ALJs experienced in the specific area of the law, the constituency which I represent is apt to suffer. (The NAACP has had the most contact with Social Security and NLRB Administrative Law Judges.) I am speaking of the individual citizen and the small businesses that become involved in the administrative process. Certain agencies e.g. Social Security and NLRB have a direct, and immediate, impact upon such parties and it is critical that the outcome of their cases not depend solely upon the expertise, skill and performance of their representatives. Yet, without an experienced ALJ familiar with the purposes the proposed legislation was intended to accomplish, the subtle nuances of the law, the elements of the various legal doctrines, those least able to secure experienced, usually more expensive, representation will suffer. One of the prices paid for a "generalist" judge is the heavy burden which falls upon the parties to "educate" the judge.

We are aware that some of the proponents of the Corps bill assert that "generalist" ALJs are most desirable and profess an absolute horror at any pre-hire requirement of specialized experience--selective certification--which is claimed to be one of the principal reasons why a large percentage of ALJs with certain agencies have previously worked for the agency in some other capacity. I would suggest that the experience requirement encompassed in the selective certification concept may not be the only factor that results in Administrative Law Judges with agency backgrounds. Consideration must also be given to the rigors and lack of discretion presently inherent in the Administrative Law Judge application process. Inadequate pay and the necessity to relocate, unaccompanied by an elevation in status serving as deterrents to private practitioners seeking Administrative Law Judge status.

Two years ago, Loren Smith stated in his testimony, "there is no reason why ALJs selected on the basis of a genuine, even if less than perfect, merit selection process, should not be able to preside over as varied a mix of cases as Federal district or state court judges, many of whom are selected after a less rigorous review." We agree. We note, for the record, that Federal district judges have law clerks. We feel that Smith's statement begs the question. The question should be, we submit, do we want our ALJs to be generalists? Is there any significant advantage to such? We say the answer is, no. In fact, some commentators are now suggesting that Federal district court judges should be specialists.

Mr. Chairman, the NAACP continues to stress the importance of specialization of ALJs. We know, from long experience, that a decision cannot be "fundamentally fair" if the person hearing a complex issue is not cognizant of even the nuances involved. Such detailed knowledge comes only with specialization.

The NAACP does not know of public discontent, generally, with ALJs. We note instead the Supreme Court's acceptance of ALJ procedures as "functionally comparable to that of a judge." Butz v. Economu, 438 U. S. 478, at 513. Such professionalism will be muted by the potential for abuse of the reassignment provisions in section 587(c) whereby an ALJ may be temporarily detailed to any location for up to four (4) months. We can conceive of the Council, under this system, using that authority punitively.

The NAACP is further concerned that there is no mandate that cases get assigned to the Corps. We note the same loophole in the APA, but we feel that the necessary correction is amendment of the APA rather than the adoption of this bill.

Removal and Discipline

The NAACP strongly supports the APA standard for removal of ALJs for "good cause." We believe an inquiry should be considered initiated by a written complaint of an affected party against an ALJ to the Complaint

Resolution Board. We note no provision in S-950 for removal of a Chief Judge. We also do not not understand nor concur with the provision allowing the Council to override the judgment of the peer review in subsection (f). Currently, the APA contains satisfactory disciplinary procedures. No need has been shown for a change. ALJs are already accountable. In our considered opinion, S-950 does nothing to enhance this situation.

Transition and Savings Provision

The NAACp finds suspect the provision in Section 4(d), that "the transfer of personnel pursuant to subsection (b) of the section shall be without reduction in classification or compensation for one year after such transfer. (emphasis added.)

The Agencies and Decisional Independence

We hope this subcommittee will not lose sight of the evolution of administrative law. The purpose for "hearings" was to allow an "agency decision" subject to judicial review on a dispute, rule, order, sanction or prayer for relief. Agencies control the caseload because the issues originate out of their original legislation.

The specialization needed to judge administrative action has historically been given "due deference" by the Courts. The role of ALJs is evolving, but we must be mindful that the "final decision" is agency action. We do not quarrel with the need to tighten the standard for agency review of an ALJ decision to the substantial evidence doctrine, but we repeat, that the final decision to grant or deny licensure, sanction, or a benefit at this stage in the administrative process is "agency action." All ALJs interpret the original legislation, agency rules and regulations, in light of the facts presented, on a case by case basis.

In performing their functions, ALJs generally do so with complete decisional independence and freedom to apply their personal understanding of the facts and the applicable law. The fact that ALJs are assigned to particular federal agencies does not impede their independence of action. The NAACP rejects the notion that the independence of ALJs is compromised by their relationship with a particular agency. This view is shared by members of the legal profession in at lest one field of administrative law. In 1983, at a meeting of the Committee on Practice and Procedure before the National Labor Relations Board of the Section of Labor and Employment Law of the American Bar Association, a group composed of both management and union labor law practitioners, the persons present unanimously expressed their opposition to the estalbishment of a corps of administrative law judges. The NAACP believes that if there were any real indications that administrative law judges are not independent of the agencies who cases they hear, the attorneys who practice before the agencies would have been the first to push for changes in the present system.

Mr. Chairman, and members of the subcommittee, we are mindful of the continuing complaints re Social Security Administration ALJs, and are sympathetic to them. The NAACP urges this subcommittee, and the Congress as a whole, to specifically address those complaints. We suggest that the problems of decisional ALJ independence exists essentially in the Department of Health and Human Services, if they exist at all. Enactment of S 950 is not the needed answer.

Amend the APA

The NAACP urges the amendment of the Administrative Procedures Act. We further recommend that you expressly address the problems of the Social Security Administration ALJs. We also urge you to reject the creation of a highly political new bureaucracy which will reverse the 40 years of evolution toward a fair and efficient administrative forum for agency decision-making.

Mr. Chairman, in deference to the need of others to testify, and the time limitations imposed, we incorporate here, by reference, a law review article entitled, "A Unified Corps of Federal Administrative Law Judges is Not Needed," published in Western New England Law Review, Volume 6, Issue 3, pp 723-744. We generally subscribe to the observations and conclusions contained in that article.

Thank you, Mr. Chairman and members of the subcommittee for allowing the NAACP to express its views on S 950.

A UNIFIED CORPS OF FEDERAL ADMINISTRATIVE LAW JUDGES IS NOT NEEDED

NORMAN ZANKEL

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A UNIFIED CORPS OF FEDERAL ADMINISTRATIVE LAW JUDGES IS NOT NEEDED

NORMAN ZANKEL*

I. INTRODUCTION

Introduction of bills to establish a nationwide Corps of Federal Administrative Law Judges[1] has rekindled debate over the efficacy of, and need for, the sweeping changes which apparently will attend enactment. The bills are endorsed by the Federal Administrative Law Judges Conference (FALJC), a professional association which represents, and admits to membership, all federally-employed administrative law judges.[2]

Many of the affected judges believe that no cogent reasons have been advanced that demonstrate a need to establish such a corps.[3] Principally, the bills are designed to insure administrative law judges' decisional independence.[4] It is asserted, however, that the existing statutes and judicial perception of federal administrative law judges comprise satisfactory and sufficient guarantees of such independence.

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The opinions of the author are his own. They do not necessarily represent the views of members of the National Labor Relations Board or any member of the Board's staff. This article has not been reveiwed or approved by the National Labor Relations Board.

[1] *See* S. 1275, 98th Cong., 1st Sess. (1983); H.R. 3539, 98th Cong., 1st Sess. (1983); *see also* 129 CONG. REC. S6609-10 (daily ed. May 12, 1983) (statement of Sen. Heflin).

[2] 129 CONG. REC. S6610 (daily ed. May 12, 1983) (statement of Sen. Heflin).

[3] Approximately 820 of the total federal complement of approximately 1150 administrative law judges are employed by the Social Security Administration (SSA). *Id.* The results of a survey conducted among the Federal Administrative Law Judges Conference membership have been cited as a claim that the corps bills are favored by a large majority of present incumbent judges. The poll's results are deceptive. 357 judges responded to the survey. Seventy-six voted against supporting the legislation. While 281 judges voted to support it, 205 of such votes were cast by SSA judges. It is clear the disputes, discussed *infra* text accompanying note 69, between these judges and their agency distorted the survey's results. Disregarding the votes cast by SSA judges would result in seventy-six judges in support of and seventy judges against the corps. *See Administrative Law Judge Corps Act: Hearings on S. 1275 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. 175, 189-90 (1983) (statement of Joseph B. Kennedy, Chairman, Ad Hoc Comm. of Administrative Law Judges) [hereinafter cited as *Hearings on S. 1275*].

[4] 129 CONG. REC. S6609-10 (daily ed. May 12, 1983) (statement of Sen. Heflin).

This article will (1) summarize the proposed legislation; (2) develop the current status of administrative law judges; and (3) analyze the reasons proferred in support of the corps and demonstrate their inadequacy.

II. Background—The Corps Bills

In his floor remarks introducing Senate bill 1275,[5] Senator Howell Heflin observed "Administrative law judges are a significant part of our Federal adjudicatory system." Administrative disputes should be adjudicated in an independent atmosphere free of bias, in order to insure fairness and give credence to administrative decisions. Structural reform of the administrative law judge system is necessary to insure truly independent adjudications.[6] The Senator also stated that his proposal would probably effect cost savings, achieve efficiencies and improve public perception of administrative law judges.[7]

The pending bill creates an "Administrative Law Judge Corps of the United States."[8] Initially, the Corps would consist of all current federal administrative law judges who would preside over all Administrative Procedure Act hearings.[9] They could also accept any other case referred to the Corps by any federal agency or court desiring to make a decision based upon a record developed at a hearing conducted by an administrative law judge.[10]

The Corps would be headed by a chief judge appointed by the President with the advice and consent of the Senate.[11] There would be seven operating divisions, identified by subject area,[12] presumably to preserve the expertise of the present judges, and each division would be headed by a presidentially-appointed division chief judge.[13] The bill establishes a five-member judicial nominating commission to submit names of qualified candidates for the positions of chief and division chief judges.[14] The number of divisions could be increased by the council, which would consist of the Corps' chief judge and the division chief judges, to a maximum of ten and decreased to not less than four divisions.[15] Additionally, the Council would have authority over appointment, assignment, transfers and reassignment of judges to the various divisions; and to prescribe rules of practice and procedure for conduct of proceedings and business before the Corps.[16] Finally, the bill contains procedures for removal and discipline of administrative law judges.[17] A Complaints Resolution Board, comprised of two judges from each substantive division and elected by the judges of each division, would receive complaints of misconduct.[18] After investigation, the Board could issue advisory recommendations to the Council which, in turn, could file charges against judges with the Merit Systems Protection Board (MSPB).[19] The MSPB, after an opportunity for a hearing on the record, could remove and discipline judges for misconduct, incompetence, neglect of duty, or for physical or mental disability.[20]

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[5] S. 1275, 98th Cong., 1st Sess. (1983). This bill is reprinted at 129 Cong. Rec. S6610-13 (daily ed. May 12, 1983). An identical bill, H.R. 3539, 98th Cong., 1st Sess. (1983), is currently pending in the House of Representatives.

[6] 129 Cong. Rec. S6609-10 (daily ed. May 12, 1983) (statement of Sen. Heflin).

[7] *Id.*

[8] S. 1275, 98th Cong., 1st Sess. § 2 (1983) (proposing codification at 5 U.S.C. § 562(a)).

[9] *Id.* (proposing codification at 5 U.S.C. § 562(b)). These powers are specified in 5 U.S.C. § 556(b)(3) (1982).

[10] S. 1275, 98th Cong., 1st Sess. § 2 (1983) (proposing codification at 5 U.S.C. § 568(a)(3)).

[11] *Id.* (proposing codification at 5 U.S.C. § 563(a)).

[12] *Id.* (proposing codification at 5 U.S.C. § 564(b)(1)-(7)).

There have been earlier efforts to separate administrative law judges from the government agencies who currently employ them. In 1941, such a proposal was studied and rejected.[21] In 1955, the Hoover Commission proposed separation.[22] In 1973, FALJC recommended such separation to the Civil Service Commission.[23] The LaMacchia Commission report suggested study of the feasibility of a corps in 1974;[24] and in 1976 a corps concept was advocated by Bernard G. Segal, former president of the American Bar Association.[25]

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[13] *Id.* (proposing codification at 5 U.S.C. § 564(a)).

[14] *Id.* (proposing codification at 5 U.S.C. § 566(a)).

[15] *Id.* (proposing codification at 5 U.S.C. § 564(a)).

[16] *Id.* (proposing codification at 5 U.S.C. § 565).

[17] *Id.* (proposing codification at 5 U.S.C. § 569).

[18] *Id.* (proposing codification at 5 U.S.C. § 569(c), (d)).

[19] *Id.* (proposing codification at 5 U.S.C. § 569(f)).

[20] *Id.* (proposing codification at 5 U.S.C. § 569(a)(1)-(2)).

[21] ATT'Y GENERAL'S COMM. ON ADMINISTRATIVE PROCEDURE, ADMINISTRATIVE PROCEDURE IN GOV'T AGENCIES, S. DOC. NO. 8, 77th Cong., 1st Sess. 47 (1941).

[22] HOOVER COMM'N ON THE EXECUTIVE BRANCH OF GOVERNMENT, LEGAL SERVICES AND PROCEDURES 87-88 (1955).

[23] UNITED STATES CIVIL SERVICE COMM'N, REPORT OF THE COMM. ON THE STUDY OF THE UTILIZATION OF ADMINISTRATIVE LAW JUDGES (LAMACCHIA COMM'N REPORT) app. (1974).

[24] *Id.* at 47, 51.

[25] Segal, *The Administrative Law Judge: Thirty Years of Progress and the Road Ahead*, 62 A.B.A.J. 1424, 1425 (1976).

In 1981, Jeffrey S. Lubbers, now Research Director of the Administrative Conference of the United States, proposed an experimental pilot program for a corps into which judges of seventeen specified federal agencies would be transferred.[26]

III. ANALYSIS OF SENATE BILL 1275

One of the arguments advanced in favor of the Corps is that the legislation will serve to correct misconceptions of administrative law judges. An examination of legislative, judicial and public perception of administrative law judges is instructive.[27]

A. *The Real and Perceived Independence of Administrative Law Judges—Functions and Responsibilities*

The principal focus of the cited studies and recommendations is decisional independence. Impliedly, at least, an independent corps of administrative law judges is a panacea. Undoubtedly administrative law judges' independence is necessary and public perception of administrative justice needs enhancement.[28] The bill as drafted, however, will not provide the correct vehicle to achieve those purposes.

Federal administrative law judges deal with matters that have an impact on virtually every phase of the national economy and our daily lives. They preside over cases involving bank mergers; labor-management relations; nuclear, oil, electric and gas energy allocation and rates; consumer products; social security benefits claims; worker's compensation; health and safety in mining and industry; interstate trade; securities regulation; international trade; communications; food and drugs; and a host of other matters.[29]

The administrative law judges serve as trial judges.[30] They presently are assigned to a myriad of federal independent and executive branch agencies which enforce or regulate federal laws. When they preside at hearings, these judges have authority to: (1) administer oaths and affirmations; (2) issue subpoenas; (3) rule upon offers of proof and receive relevant evidence; (4) take or cause the taking of depositions; (5) hold pre-hearing conferences for settlement or simplification of issues; (6) regulate the course of the hearing; (7) dispose of procedural requests; (8) question witnesses; (9) consider the facts in the record and the arguments and contentions made, or questions involved; (10) determine credibility and make findings of facts and conclusions of law; and (11) take any actions authorized by agency rule consistent with provisions of the United States Code, Title 5.[31]

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[26] Lubbers, *A Unified Corps of ALJs: A Proposal to Test the Idea at the Federal Level*, 65 JUDICATURE 266, 275-76 (1981).

[27] *See* 129 CONG. REC. S6610 (daily ed. May 12, 1983) (statement of Sen. Heflin).

[28] Address by Senator Howell Heflin to American Bar Association, Institute of Judicial Administration (July 30, 1983).

[29] *Id.*

[30] 5 U.S.C. § 556(b)(3) (1982). There is a functional difference, however, between the SSA judges and the remainder of the federal administrative law judge complement. Hearings conducted by the former essentially are non-adversarial and not required to conform to the Administrative Procedure Act. The latter group conduct adversarial hearings.

1. Judicial Perception

Administrative law judges are vested with no less responsibility for maintaining the integrity of our judicial system than the judges commissioned pursuant to Article III of the United States Constitution. The Supreme Court, in 1978, recognized in *Butz v. Economou*,[32] that administrative law judges are "functionally comparable" to judges employed in the judicial branch and conferred on them absolute immunity for judicial acts.[33] In doing so, the Court observed: "There can be little doubt that the role of the . . . administrative law judge is 'functionally comparable' to that of a [constitutional] judge. His powers are often, if not generally, comparable to those of a trial judge. . . ."[34]

In 1980, the Supreme Court, in *Marshall v. Jerrico, Inc.*,[35] again commented upon the role of these judges. The Court observed that the independent administrative law judge is one "whose impartiality serves as the ultimate guarantee of a fair and meaningful proceeding in our constitutional regime."[36]

More recently, United States Court of Appeals Judge Aldisert, in a concurring opinion in *NLRB v. Permanent Label Corp.*,[37] took the time to enunciate the rationale for viewing administrative law judges as unique and highly-respectable decision-makers. Judge Aldisert wrote:

> Accepting for purposes of argument that to be impartial judges must be independent of all political or employment pressures, I submit that the view that the [administrative law judges]

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[31] *Id.*

[32] 438 U.S. 478 (1978).

[33] *Id.* at 512-13.

[34] *Id.* at 513.

[35] 446 U.S. 238 (1980).

[36] *Id.* at 250.

[37] 657 F.2d 512 (3d Cir. 1981).

> are not sufficiently independent or competent is now so shopworn as to be totally obsolete. To the contrary, [administrative law judges], though not yet annointed with life tenure, enjoy an independence that in my view is plainly sufficient to satisfy reasonable doubts.
>
> For example, although [administrative law judges] are considered agency personnel, they are selected by the Office of Personnel Management (OPM) independently of any agency recommendation or rating, 5 U.S.C. § 5362, and cannot be removed from office without a hearing establishing good cause before the Merit Systems Protection Board, 5 U.S.C. § 7521. Their pay is controlled by the Civil Service Commission. [Administrative law judges] can be disqualified from a case only upon petition by either the agency or a private party. 5 U.S.C. § 556(b). Similarly, cases are assigned on a rotating basis so that the agency cannot "fix" the result by choice of judge. 5 U.S.C. § 3105. They are not subject to the whim of the agency. [Administrative law judges] are strictly independent of investigative or prosecutorial personnel in the agency. 5 U.S.C. § 554(d).
>
> Moreover, the selection process for [administrative law judges] should inspire more respect for this office than is generally extended by Article III judges; it is a process that requires rigorous inquiries into the background and competence of the candidates. Applicants must supply twenty professional references. A minimum seven years of litigation experience is required to meet the threshhold selection requirement. A test opinion must be drafted and evaluated on the basis of many factors including clarity and conciseness. . . . Finally, after the various scores have been combined, applicants considered tentatively eligible are interviewed by a special panel usually composed of an OPM official, an attorney qualified in the field of administrative law, and an agency official. This committee submits a recommendation to the director of OPM who makes final eligibility determinations among qualified candidates. Once appointed to an agency, an [administrative law judge] is not subjected to the usual probationary employment period for agency employees, further insuring [administrative law judge] independence. 5 U.S.C. § 3321. . . .
>
> The rigors of the selection procedure and the statutory protections of [administrative law judge] independence suggest to me that the federal judiciary need not look down its collective nose at [administrative law judge] decisions.[38]

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[38] *Id.* at 527-28.

2. Congressional Perception

Congress has recognized the need of administrative law judges to possess decisional independence. Relevant legislative history demonstrates Congress's concern for preservation of those judges' independence from influences, especially agency influences, that might in any way reduce that independence.[39] That concept was embodied as a major reform within the federal Administrative Procedure Act (APA).[40] Congress took as its mission the assurance of fairness in the full range of administrative action affecting the public. It was especially concerned with the trial-type hearing which came to be governed by sections 5 through 8 of the APA.[41] It recognized a need to allay public "suspicions . . . that the submittals of private parties are not fully considered, that the views of agency personnel are emphasized without opportunity for private parties to meet them, and that matters outside the record are often the real grounds for decision."[42]

Prior to the APA's enactment, Congress had before it a system in which administrative trials were held before agency employees, subject to agency control respecting classification pay, promotion and tenure; individuals in a "dependent status."[43] "There were no reliable safeguards to ensure the objectivity and judicial capability of presiding officers. . . . [T]he power of the agencies to control and influence such personnel made questionable the contention of any agency that its proceedings assured fundamental fairness."[44] There was no statutory professional corps of administrative law judges. Agencies could assign employees to preside over a trial one day, and administer a program the next.

Congress addressed these concerns in enacting section 11 of the APA.[45] It vested the judges[46] with the duty to exclusively preside at trial-type hearings; and made their compensation outside of agency control. Administrative law judges became subject to removal only for good cause, after a hearing on the record, subject to judicial review[47]—a procedural right unique to federal civil servants serving under Article I of the Constitution.[48] All other federal employees are removable prior to hearing and must pursue their hearing and review rights after their employment ceases.[49]

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[39] *See* ATT'Y GENERAL'S COMM. ON ADMINISTRATIVE PROCEDURE, ADMINISTRATIVE PROCEDURE IN GOV'T AGENCIES, S. DOC. NO. 8, 77th Cong., 1st Sess. 272 (1941).

[40] 5 U.S.C. §§ 551-559, 701-706, 1305, 3105, 3344, 6362, 7562 (1982).

[41] ATT'Y GENERAL'S COMM. ON ADMINISTRATIVE PROCEDURE, ADMINISTRATIVE PROCEDURE IN GOV'T AGENCIES, S. DOC. NO. 8, 77th Cong., 1st Sess. 272 (1941).

[42] *Id. quoted in* Macy, *The APA and the Hearing Examiner: Products of a Viable Political Society,* 27 FED. B.J. 351, 354 n.7 (1967).

[43] Ramspeck v. Federal Trial Examiners Conference, 345 U.S. 128, 130 (1953).

[44] Lubbers, *Federal Administrative Law Judges: A Focus on Our Invisible Judiciary*, 33 AD. L. REV. 109, 111 (1981).

[45] Pub. L. No. 79-404, § 11, 60 Stat. 237, 244 (1946) (current version at 5 U.S.C. § 7521 (1982)); *see* Nash v. Califano, 613 F.2d 10, 14-15 (2d Cir. 1980).

[46] The hearing examiner title was changed administratively to"Administrative

Section 11 drew upon "the more ancient wisdom grounded in history and contained in Article III, which safeguards federal judicial independence through still more stringent compensation and tenure provisions."[50] Just as the independent judiciary was "structurally insulated from the other branches to provide a safe haven for individual liberties in times of crisis,"[51] so Congress intended administrative law judges to act as a bulwark for administrative litigants, as "a critical check on potentially excessive or unauthorized regulation."[52] Within their sphere, the judges were given a role "functionally comparable" to that of a federal trial judge.[53] These provisions were the very heart and sole of the new act.[54]

The APA's guarantee of independence not only recognized the unique status of administrative law judges within the executive branch, but also invested their decisions with authority earlier withheld by reviewing courts, who had considered the judges as "not sufficiently independent or competent" to deserve deference.[55]

By 1953, the Supreme Court had noted the new guarantees of administrative law judges' independence: Congress intended to provide tenure for hearing examiners within Civil Service concepts.[56] They were not to be paid, promoted, or discharged at the whim or

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Law Judge" in 1971, *see* 37 Fed. Reg. 16,787 (1982), and was later adopted by Congress. Act of March 27, 1978, Pub. L. No. 95-251, §§ 2, 3, 92 Stat. 183, 183-84.

[47] Administrative Procedure Act of 1946, ch. 324, § 11, 60 Stat. 237, 244 (1946) (current version at 5 U.S.C. §§ 551-559, 701-706, 1305, 3105, 3344, 6362, 7562).

[48] *Id.*

[49] *See* 5 U.S.C. § 7513 (1982); Arnett v. Kennedy, 416 U.S. 134, 145-46 (1974).

[50] Nash v. Califano, 613 F.2d 10, 15 (2d Cir. 1980); *see Butz*, 438 U.S. at 514; Ramspeck v. Federal Trial Examiners Conference, 345 U.S. 128, 132-33 (1953).

[51] Nash v. Califano, 613 F.2d 10, 15 (2d Cir. 1980).

[52] *Hearings on H.R. 6768 Before the House Comm. on Post Office and Civil Service*, 96th Cong., 2d Sess. 27-28 (1980) (statement of Christopher McNaughton).

[53] *Butz*, 438 U.S. at 513.

[54] *See Butz*, 438 U.S. at 514; Wong Yang Sung v. McGrath, 339 U.S. 33, 51-53 (1950); *see also* Zwerdling, *Reflections on the Role of an Administrative Law Judge*, 25 AD. L. REV. 9, 13 (1973).

[55] *Permanent Label Corp.*, 657 F.2d at 527.

[56] Ramspeck v. Federal Trial Examiners Conference, 345 U.S. 128, 142 (1953).

caprice of the agency or for political reasons.[57]

In addition to these provisions, the APA prohibits administrative law judges from engaging in *ex parte* communications regarding facts in issue unless all parties are notified and given an opportunity to participate in those discussions; prevents supervision by someone who performs investigative or prosecutorial functions in their agencies; and proscribes review of administrative law judges' decisions by agency personnel who performed investigative or prosecutorial activities in the particular case under review.[58]

Congress, in some areas, has provided even greater assurances of administrative law judges' independence. For example, the Federal Mine Safety and Health Review Commission and the Occupational Safety and Health Review Commission contain separate corps of judges whose decisions are final, subject only to discretionary appellate review by those Commissions.[59] The review standard imposed on the Federal Mine Safety and Health Review Commission is the same as that which Article III courts apply to the Commission itself.[60] Additionally, the National Labor Relations Act expressly provides for strict separation of the NLRB General Counsel and his staff from the five-member Board, its staff and the administrative law judges assigned to that agency.[61]

3. Public Perception

This element is the most difficult to evaluate. Its components are varied and derive from a variety of factors. Judicial and legislative pronouncements affect the public view of administrative law judges, and media reports of these judge-conducted hearings also have an impact.

The most accurate reflection of public perception should emanate from personal confrontations between individual citizens and administrative law judges. Because the confrontations are few, the manner in which the public perceives administrative law judges is principally dependent upon the reports of the administrative judiciary received from legal practitioners and other on-the-scene observers. The available evidence, admittedly sparse, tends to demonstrate that administrative law judges generally enjoy a positive position in the administrative process.

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[57] *Id.*

[58] 5 U.S.C. §§ 554, 556, 557 (1982).

[59] 30 U.S.C.A. § 823 (West Supp. 1983); 29 U.S.C.A. § 661(i) (West Supp. 1983).

[60] Donovan *ex rel.* Chacon v. Phelps Dodge Corp., 709 F.2d 86, 90-92 (D.C. Cir. 1983) (findings by the Commission's administrative law judges are final and conclusive).

[61] 29 U.S.C.A. § 153 (West 1973 & Supp. 1983).

There are references to administrative law judges as the "hidden judiciary."[62] Ostensibly, that characterization connotes a negative aura. It is equally susceptible, however, to the opposite conclusion. It readily imparts a feeling that these judges are performing their functions at acceptable levels. The absence of a public display of dissatisfaction, except regarding the Social Security Administration,[63] with the performance of the administrative process is rather compelling evidence that administrative law judges presently dispense judicious, fair, objective and competent administrative justice. It does not matter that individual members of the public are unaware of the distinction between administrative law, or other, judges. To them, anyone invested with the title "judge" has certain plenary authority. The fine distinctions between judges are irrelevant.

Two examples of public perception are noteworthy. Both examples were presented to the Senate subcommittee which conducted hearings on Senate bill 1275 on September 20, 1983. When presenting the views of the National Association for the Advancement of Colored People (NAACP), Althea T. L. Simmons, NAACP Washington D.C. Bureau Director commented: "In our opinion, the idea that the independence of Administrative Law Judges is compromised by their relationship with a particular agency, past or present, is without merit."[64] In a similar vein, Judge Joseph B. Kennedy of the Federal Mine Safety and Health Review Commission, testified:

> at a recent meeting of the Committee on Practice and Procedure before the National Labor-Relations Board of the Section of Labor and Employment Law of the American Bar Association, a group composed of both management and union labor law practitioners. Those present virtually unanimously expressed their opposition to establishment of a corps of administrative law judges. If there were any real indications that administrative law judges are not independent of the agencies whose cases they hear, the attorneys who practice before the agencies would have been the first to seek changes in the present system.[65]

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[62] U.S. News & World Report, Nov. 1, 1982, at 56; Rich, *Central Panels of Administrative Law Judges: An Introduction*, 65 JUDICATURE 233, 233 (1981); Lubbers, *supra* note 44, at 109.

[63] *See infra* text accompanying note 69.

[64] *Hearings on S. 1275*, *supra* note 3, at 163 (statement of Althea T. L. Simmons, Director, Wash. Bureau, NAACP).

[65] *Id.* at 179 (statement of Hon. Joseph B. Kennedy).

I echo these remarks. Those who argue that public perception needs improvement are guided by a base of an inherently fallacious assumption that the existing system engenders its broad disdain. There simply is no evidence that this assumption is correct. The information available relative to the approximately nineteen federal administrative agencies, other than the Social Security Administration (SSA) does not support such an assumption.

4. Summary

The courts accord administrative law judges and their decisions, deference and respect.[66] Congress has consistently pursued a course which is designed to afford maximum assurance of decisional independence and special status to administrative law judges.[67] They have been well-insulated from agency influence by statute.[68] The public appears satisfied with their performance. There simply has been no substantive argument or data presented that requires legislative action to improve perceptions of the administrative judiciary.

B. *Decisional Independence*

In the backdrop of legislative and judicial protection provided, the argument that the bill provides greater decisional independence to administrative law judges wanes. There are no new indicia of autonomy contained in those bills.

The independence which is substantive and critical is the existence of freedom to find facts and render a decision based upon a judge's personal assessment of the facts and law without fear of retaliation or discrimination based on the resulting conclusions and decisions.

The issue of decisional independence was resolved by enactment of the APA. Other existing statutes, and civil service regulations effectively form the tools by which to recognize that independence and the special status of administrative law judges. What is needed is strict implementation of those mandates; not a change in them.

Only one example of possible improper agency interference has been cited. That is, the nascent situation in SSA. In that agency, the judges have complained that they are being subjected to improper pressures to deny disability benefits by the imposition of production quotas, and by the conduct of unauthorized performance appraisals which result in unfounded disciplinary action against them.[69]

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[66] *See supra* text accompanying notes 32-38.

[67] *See supra* notes 39-54 and accompanying text.

[68] *See supra* notes 55-61 and accompanying text.

The concerns of the SSA judges are clearly legitimate. Their allegations, alone, clearly tend to undermine public confidence in the administrative judiciary. If true, those allegations seriously detract from the critical elements of decisional independence which Congress has taken decades to develop.

However, problems of SSA judges apparently are unique to them. During the Senate hearings on Senate bill 1275 on June 23 and September 20, 1983,[70] several witnesses appeared and testified. No evidence was presented to show judicial, legislative or public concern that the present administrative process is unfair, except within SSA. If the SSA judges' complaints are justifiable, they arise from their functional differences from other judges, and also SSA's failure to apply the existing administrative law judges protections to its judges; and not from the absence of statutes which prescribe independence. If the APA, and other relevant statutes and regulations, are being ignored in agencies other than SSA, it was incumbent upon the proponents of the Corps to produce such evidence. The failure to do so, belies the claim that there is a generalized lack of decisional independence.

Solution of any problems which may exist within SSA does not depend upon enactment of Senate bill 1275. Two bills, Senate bill 1911[71] and House resolution 3541,[72] are pending which directly address those problems. Senate bill 1911 is entitled a bill "to ensure the independence of certain administrative law judges."[73] The bill proposes to establish a separate new Health and Human Services Review Commission, patterned after the legislation which governs the Occupational Health and Safety and Federal Mine Safety Review Commissions.[74] The bill proposes transfer of all SSA judges to the new commission, effectively removing them from their present condition by which they are subject to executive and administrative supervision.[75] The SSA judges' professional organization has urged favorable action on this bill. In the absence of empirical information that administrative law judges' independence is threatened in other agencies, it clearly is more efficient and appropriate for Congress to concentrate on methods of solving such problems where they exist than to interrupt a system, developed by careful deliberation and proved successful by experience, where there is no attack upon the judges' independence.

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[69] *See, e.g.*, Nash v. Califano, 613 F.2d 10 (2d Cir. 1980).

[70] The author personally attended the hearings.

[71] 98th Cong., 1st Sess. (1983).

[72] *Id*.

[73] S. 1911, 98th Cong., 1st Sess. (1983).

[74] *Compare id. with* 29 U.S.C. § 661 (1976 & Supp. V 1981) *and* 30 U.S.C. § 823 (1976 & Supp. V 1981).

[75] S. 1191, 98th Cong., 1st Sess. (1983).

The administrative law judges assigned to the independent commissions such as the Federal Mine Safety Review Commission and Federal Energy Regulatory Commission suffer no patent problems of interference with independence. They all apparently function well under the existing statutory scheme. Thus, to ameliorate whatever problem exists regarding independence of the judges, Congress need only establish the Health and Human Services (HHS) Review Commission. That move, alone, would provide the SSA judges with the safeguards of independence presently enjoyed by all other federal administrative law judges. In this context, there is no need to make structural changes in the administrative judiciary. Establishment of the HHS Review Commission provides the solution to the solitary, vexing issue of administrative law judges' independence. It would be directly responsive to the arguments that any real threat to independence exists, without disrupting the adequate operations of administrative law judges pursuant to the APA.

IV. OTHER CONSIDERATIONS

Senate bill 1275 raises other issues that require examination. In their totality, they show that the bill, in its present form, should not be enacted.

A. *Administrative Law Judge Expertise*

Clearly, a goal of the legislation is to have a group of administrative law judges who are able to conduct hearings of all types. The bill, however, also recognizes the importance of maintaining expertise in certain areas of the law. The seven enumerated substantive divisions are designed to retain the need for specialization.[76]

The bill's design is flawed. First, preservation of expertise is only symbolic. As earlier noted, the Corps' divisions are temporary.[77] Their number is subject to fluctuation at the whim of the council[78] and they are subject to change immediately upon enactment.[79] Second, the subject-matter groupings within the divisions is contrary to the purported aim of expertise preservation. Some of the divisions contain such an amalgam of substantive legal subjects that would require judges expert in one area of the division to undertake extensive training to become competent in another subject.[80]

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[76] *See* S. 1275, 98th Cong., 1st Sess. § 2 (proposing codification at 5 U.S.C. § 564(b)(1)-(7)).

[77] *Id.* (proposing codification at 5 U.S.C. § 564(b)).

For example, the Division of General Programs is designed to hear cases currently heard by administrative law judges assigned to the Drug Enforcement Administration and the Merit Systems Protection Board. These areas are plainly unrelated to one another. The former involves regulation and control of potentially dangerous drugs, while the latter deals with labor relations problems between federal employees and their employers. Their substantive underpinnings are patently dissimilar. Each area contains wholly separate specialized and technical knowledge.

It is not suggested that most of the present administrative law judges are not sufficiently endowed with an ability to conduct complete, fair and impartial hearings and issue decisions in both areas. Yet certainly, such transitions will not be easy. A system requiring study and re-education is inefficient and contrary to the fundamental goal of the administrative law system. Separate agencies were established by Congress precisely to assure the development and maintenance of entities imbued with a high level of expertise in specialized legal subjects. A merger of certain areas with others diminishes the congressional intent and operational features which have withstood the tests of time and experience. Needed expertise could be improperly diverted if the Corps' Council, in its wisdom, were to make substantial changes in the composition of the divisions by contraction. NAACP spokeswoman Simmons told the senators at the September, 1983 hearings that

> [O]ne of the more troubling aspects of [Senate bill] 1275 is the destructive impact it would have upon the level of expertise possessed by [administrative law judges]. . . . Aside from the initial assignment of current [administrative law judges] to divisions, there is no requirement that [they] be assigned to the division in which they possess expertise. . . .
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> Our legal system, both judicial and administrative, is becoming increasingly more complex and without [administrative law

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[78] *Id.*

[79] *Id.*

[80] *See id.*

> judges] experienced in the specific area of the law . . . [the public] . . . is apt to suffer. . . . [W]ithout an experienced [administrative law judge] familiar with the purposes the particular legislation was intended to accomplish, the subtle nuances of the law, the elements of the various legal doctrines that apply, and what information must be elicited to apply those doctrines, *those least able* to secure experienced, usually more expensive, representation will suffer. One of the prices paid for a 'generalist' judge is the heavy burden which falls upon the parties to 'educate' the judge.[81]

Malcolm Rich, while employed as a research attorney at the American Judicature Society, cogently observed that whether administrative law judge specialized expertise is necessary "probably depends on the type of case—a rate-making proceeding may require more technical expertise than a case involving eligibility for benefits."[82]

The tenuous existence of the seven divisions contained in Senate bill 1275 reduces the opportunity for fair consideration of the nature and type of cases as a factor in utilization of expertise. Assignment of hearing priorities and transfer of judges among the divisions is left to the Council's discretion.[83] The most well-intentioned implementation of that authority could impede enforcement of laws by assigning judges out of their areas of expertise to divisions which the Council has deemed to require priority action.

Redistribution and realignment of judges in such circumstances could conceivably be detrimental to agencies that must hear and decide cases under a particular statute. If agencies lose control of their enforcement obligations, the provisions of Senate bill 1275 which purportedly preserve expertise become illusory.

B. *Cost Effectiveness*

It has been urged that a unified corps will result in substantial cost savings and efficiencies. That assertion is undocumented. No cost analysis apparently has been made or presented. Instead, this bare assertion is drawn from recent experience among some states which have adopted central panel systems. In particular, the significant cost savings made in Minnesota have been cited.[84]

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[81] *Hearings on S. 1275*, *supra* note 3, at 162-63 (statement of Althea T. L. Simmons) (emphasis in original).

[82] Rich, *Adapting the Central Panel System: A Survey of Seven States*, 65 JUDICATURE 246, 253 (1981).

[83] S. 1275, 98th Cong., 1st Sess. § 2 (proposing codification at 5 U.S.C. § 565(d)).

During testimony at the June, 1983 Senate hearings, Duane R. Harves, Minnesota Chief Hearing Examiner, conceded "it has been somewhat difficult to determine the actual cost savings . . ."[85] achieved by operation of a central panel system. He stated that significant cost savings were realized from centralization of the Minnesota hearing officers into an office independent of the agencies it services.[86] Nonetheless, it is difficult to fully assess how much of the savings are directly attributable to centralization. Mr. Harves stated that Minnesota realized a ten percent reduction in the office caseload since the central panel system was installed.[87] That reduction directly resulted from legislative budget cutting.[88] Another thirty-five percent reduction in caseload was ascribed to legislation which reduced the number of hearings required to be held.[89] Mr. Harves cited actual cost reductions, in dollar amounts, in certain enumerated state agencies. None exceeded fifty percent.[90] Assuming the forty-five percent caseload drop results in an equal percentage of cost reduction, the total cost decrease is not as substantial as heralded by the proponents of Senate bill 1275. Moreover, the cost of operating the new centralized office does not appear to have been factored into the statistics of the reductions discussed. The addition of those sums undoubtedly would further diminish the overall amount of reduced costs evolving from the Minnesota consolidation.

Malcolm Rich observed, regarding costs of central panel systems, that there is a "striking . . . lack of hard data on budgetary issues [and] . . . most views on the budgetary issue are not based on financial studies; necessary data is often unavailable."[91] Those observations were made in 1981. Today, more specific fiscal data surely is available. It is unclear whether any effort has been made to search for such information. Mr. Harves' Senate remarks, two years after Mr. Rich's observations demonstrate that more recent, though not altogether complete, statistics are available. The seemingly insufficient investigation into this area cannot be used in support of the legislation. Those who advocate enactment of Senate bill 1275 bear the burden of producing evidence to support their contentions, or explain why it is not feasible.

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[84] *Hearings on S. 1275*, *supra* note 3, at 84-90 (statement of Hon. Duane R. Harves, Minnesota Chief Administrative Law Judge).

[85] *Id.* at 85.

[86] *Id.* at 87.

[87] *Id.* at 88.

[88] *Id.*

[89] *Id.*

[90] *Id.* at 87.

[91] Rich, *supra* note 82, at 250.

In the face of an attempt to effect the widespread reorganization contemplated by Senate bill 1275, in the posture of an existing federal system virtually free of major criticism (except in SSA), reflective study and analysis should precede action on the Corps' bill. To date, a paucity of probative financial evidence has been produced.[92] Surely, the diverse and important interests at stake in federal administrative proceedings deserve more deliberate study to enable the making of the most accurate conclusion whether or not a unified federal administrative law judge corps actually will achieve cost reductions. This issue should not be resolved by mere rhetoric of interested participants.

C. *Improved Efficiency*

Another argument submitted to support Senate bill 1275 is that it will foster more efficient operation of the administrative process and increase flexibility in assignment of judges to cases. It is asserted that a corps will enable "better correlation to the various peaks and valleys of individual agency caseloads and would eliminate agency overstaffing to meet surges of adjudicative activities in order to avoid backlogs and constituent complaints."[93] As with the cost-savings issue, no documentation was submitted to support this position.

There is some evidence to show that efficiency of operations has not been a motivational element in establishing judges' corps in state jurisdictions. It is only an unsupported assumption that an employment relationship between the judges and their agencies will compromise either decisional independence or the alleged salutary effects of organizational separation. Only four state central panels (California, Colorado, Massachusetts and Tennessee) vest assignment discretion in the panel director.[94] In other central panel states (Florida, Minnesota, New Jersey), the director is required to make hearing assignments based upon the judges' expertise in the subject matter of the proceeding.[95] In other states, each employing agency that employs administrative law judges retains assignment discretion.[96] No evidence has been proffered that the administrative process has been made more, or less, efficient by the use of any of these systems.

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[92] In 1981, the states of California, Colorado, Florida, Massachusetts, Minnesota, New Jersey, and Tennessee had some form of central panel in operation. Rich, *supra* note 82, at 249. The proponents of S. 1275 presented only the Minnesota experience. Clearly, the efforts to document cost savings is incomplete.

[93] *Hearings on S. 1275*, *supra* note 3, at 27 (statement of Hon. Victor W. Palmer, Chairman of the Corps Comm. of the Federal Administrative Law Judges Conference).

[94] M. RICH & W. BRUCAR, THE CENTRAL PANEL SYSTEM FOR ADMINISTRATIVE LAW JUDGES: A SURVEY OF SEVEN STATES 50 (1983).

Also, no documentation was presented to show the present federal procedures lead to overstaffing. In fact, there are safeguards to protect against the condition. Distribution of judges to agencies is controlled by Office of Management and Budget and Congress. The federal agencies must justify their requests for judges to those bodies. No data has been offered which demonstrate that any agency suffers an overstaffing problem.

Staff surplus normally is caused by inaccurate caseload forecasting. Those prognostications depend upon a variety of factors. Such external, uncontrollable, factors as the nation's economic climate, stability and growth of certain industries, human and industrial relations philosophies and practices, national defense posture, research and development activities, and fiscal policies have an impact upon their conclusions. These elements contribute to making the present system subject to error in staffing forecasts.

Nothing in Senate bill 1275 can eliminate the presence of these forces. How centralization of assignment procedures might control them is entirely elusive and unexplained.

Regarding the superior efficiency claimed to exist within Senate bill 1275, it is argued that the Corps would reduce present duplication of support services such as law libraries, case-tracking systems, administrative and clerical personnel, office space and travel offices.[97] That argument bears little merit. Concededly, there may be some amelioration of existing profusion. The attendant "efficiencies", however, would be insubstantial and speculative. Currently, the agencies to which administrative law judges are assigned maintain the enumerated facilities for the benefit of all agency personnel, including the judges.[98] Senate bill 1275 would do nothing to change the agencies' need to provide those services to non-administrative law judges. In reality, Senate bill 1275 merely would effect a transfer of those functions, as they apply to, and are necessary for, the judges to the Corps. As earlier noted, all incumbent judges would be transferred to the Corps under the scheme of Senate bill 1275.[99] The judges' support requirements will not vanish. In this context, it is entirely possible that the transfer of support services would increase, rather than reduce, overall operational costs and inefficiency.

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[95] *Id.*

[96] *Id.*

[97] *Hearings on S. 1275*, *supra* note 3, at 26 (statement of Hon. Victor W. Palmer).

[98] *Id.*

That a new, patently unwieldy, bureaucracy will emanate from Senate bill 1275 cannot be ignored. The Corps would initially consist of over 1100 judges, over 800 of whom (in SSA) are stationed in approximately 140 locations throughout the country.[100] Additionally, the Corps necessary would have to include law clerks, paralegal personnel, together with clerical and administrative staffs. It has been estimated that the entire employee complement of the Corps would reach 5,000 individuals.[101] Management of such numbers of personnel, most of whom under present conditions are situated in outposts scattered around the nation, poses self-evident conflicts to a claim of efficiency.[102]

Finally, Senate bill 1275 inherently is inefficient. I have earlier alluded to the manner in which the operating divisions will be organized. There is an imbalance in administrative law judges complement among the substantive divisions. For example, the Division of General Programs and Grants will include judges now serving in six agencies (Drug Enforcement Administration, Housing and Urban Development, Food and Drug Administration, Bureau of Alcohol, Tobacco and Firearms, Postal Service and Merit Systems Protection Board).[103] On October 31, 1982, only ten judges were attached to those agencies, *in toto*.[104] In contrast, the Division of Labor Relations (National Labor Relations Board and Federal Labor Relations Authority) will consist of judges from two agencies.[105] On

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[99] S. 1275 98th Cong., 1st Sess. § 2 (1983) (proposing codification at 5 U.S.C. § 562(b)).

[100] *Hearings on S. 1275*, *supra* note 3, at 180-81 (statement of Hon. Joseph B. Kennedy).

[101] *Id.*

[102] A literal interpretation of S. 1275 demonstrates the magnitude of its inherent inefficiency. The Corps is to be located "at the seat of Government"; presumably Washington, D.C. S. 1275, 98th Cong., 1st Sess. § 2 (1983) (proposing codification at 5 U.S.C. § 562(a)). Currently, administrative law judges are stationed in widely dispersed areas of the country or are required to travel throughout the nation from bases in the capital. Surely, S. 1275 does not seriously contemplate that each litigant and witness will be required to appear in Washington to be heard. If not, then the potential efficiencies asserted from consolidation are imagined.

[103] *Hearings on S. 1275*, *supra* note 3, at 42-43 (statement of Hon. Victor W. Palmer).

[104] *Id.* at 63.

[105] *Id.* at 43.

October 31, 1982, there were 123 judges assigned to those agencies;[106] and the Division of Benefits Programs will be formed with judges of only one agency (SSA),[107] to which 820 judges were assigned on October 31, 1982.[108]

It has been asserted that a "collegial structure" of management is established by the bill.[109] A more precise term is "collision" structure. As earlier observed, the chief judge of each of the Corps' substantive divisions will be its managerial body, together with the Corps' chief judge.[110] When perceived needs for professional and non-professional staffing, case-handling priorities, and budgetary requirements are evaluated by each of the division chiefs, unavoidable conflicts will arise. The Council and chief judge are likely to become preoccupied with matters of internal strife, the unravelling of which will be dictated by the imbalance of power implied by the sheer numerical comparisons of judges' complement and caseload within the competing divisions.

Currently, each agency is able to establish its own priorities relative to the performance of its special statutory mandates. Except for the problem within SSA, there are no serious challenges from the administrative law practitioners or the general public that the agencies are not satisfactorily fulfilling their obligations. Viewed in this light, it seems more efficient to leave the present system undisturbed than to create an entity with limitless possibilities of fomenting frustration, anxiety and enmity.

D. *Miscellaneous Claims*

It has been urged that independence is questionable because employing agencies provide their judges with such things as office space, parking facilities and travel assistance.[111] Obviously, those items are ministerial and administrative in character. It is straining to use such arguments as proof there is an impediment to decisional freedom.

Finally, at the June, 1983 Senate hearing, it was suggested that the bill "provide[s] new means for assisting our overloaded federal courts . . . at their request."[112] Senate bill 1275 authorizes federal courts, as well as agencies, to refer certain types of proceedings to the Corps.[113]

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[106] *Id.* at 63.

[107] *Id.* at 43.

[108] *Id.* at 63.

[109] *Id.* at 41.

[110] S. 1275, 98th Cong., 1st Sess. § 2 (1983) (proposing codification at 5 U.S.C. § 565(a)).

[111] *Hearings on S. 1275*, *supra* note 3, at 177 (statement of Hon. Joseph B. Kennedy).

No evidence was produced to show that the federal courts will request such assistance. In any event, the possibility that the administrative law judges might render such assistance is not a persuasive reason to establish the Corps. To be potent, an argument should be directed to show how the various features of the Corps bills improve the *administrative* process.

V. CONCLUSION

The claimed benefits of Senate bill 1275 are only superficially appealing. Thoughtful analysis demonstrates their inadequacies. Insufficient data has been presented to prove a need for an administrative law judge corps. The available evidence shows the present administrative processes function satisfactorily under the APA.

Congress should not enact Senate bill 1275 or House resolution 3539. Instead, it should take steps to remove the cloud from decisional independence in the only place where it has been shown to be present: SSA. Administrative law judge decisional independence will be reaffirmed by transfer of SSA judges to a Health and Human Services Review Commission. The entire administrative judiciary need not be overhauled.[114]

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[112] *Id.* at 27 (statement of Hon. Victor W. Palmer).

[113] S. 1275, 98th Cong., 1st Sess. § 2 (1983) (proposing codification at 5 U.S.C. § 568(a)(3)).

[114] On October 5, 1983, Congresswoman Mary Rose Oakar (Chair, House Subcommittee on Compensation and Employee Benefits, Committee on Post Office and Civil Service), joined by Congressman Clarence Long, introduced H.R. 4090, 98th Cong., 1st Sess. (1983). At this writing, the introduction of an identical bill is being considered in the Senate. H.R. 4090 would transfer administrative law judge pay authority from the Office of Personnel Management to the Commission of Executive, Legislative and Judicial Salaries. *Id.*

The Oakar bill serves to cure a legislative oversight during enactment of the 1978 Civil Service Reform Act, ch. 11, Pub. L. No. 95-454, 92 Stat. 1119 (1978) (codified at 5 U.S.C. §§ 1101-1105 (1982)). Under the 1978 Act, administrative law judges were exempt from the performance appraisal, pay bonus, and other provisions applicable to senior non-administrative law judge officials. *Id.* § 203(a) (codified at 5 U.S.C. § 4301 (1982)). This was proper because work appraisals and monetary influences are inconsistent with decisional independence. H.R. 4090 removes administrative law judges from the pay schedules which apply generally to federal career employees. H.R. 4090, 98th Cong., 1st Sess. (1983). This bill should be passed in conjunction with the HHS Review Commission. Its enactment will complement the administrative law judge exclusion from the Civil Service Reform Act and will signal further cognition of the judicial character and unique status Congress has historically accorded to administrative law judges. H.R. 4090 is supported by the Federal Administrative Law Judges Conference without

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apparent controversy. Favorable action on that bill will reconfirm congressional intent to foster independence for administrative law judges.

SENATOR HOWELL HEFLIN'S

QUESTIONS FOR JUDGE MARY ELLEN BITTNER

1. JUDGE BITTNER, HOW MANY MEMBERS DOES YOUR ORGANIZATION HAVE? AND HOW DOES THAT MEMBERSHIP BREAK-DOWN BY AGENCY?

2. IF WE ASSUME YOU ARE CORRECT IN YOUR ASSERTION THAT THE ADMINISTRATIVE LAW JUDGES AT SSA ARE THE ONLY ALJS WITH A PROBLEM CONCERNING DECISIONAL INDEPENDENCE, HOW SIGNIFICANT IS THIS PROBLEM IN VIEW OF THE FACT THAT ALJS IN THE SOCIAL SECURITY ADMINISTRATION COMPRISE 68 PERCENT OF ALL ALJS? WHY DO YOU FEEL THE REMEDIES CURRENTLY AVAILABLE UNDER THE APA ARE SUFFICIENT PROTECTIONS FOR ADMINISTRATIVE LAW JUDGES?

3. IF THE CONCERN OF MAINTAINING THE EXPERTISE OF JUDGES IS ELIMINATED, HOW WOULD YOU PERCEIVE THE DIFFERENCE IN DECISIONAL INDEPENDENCE OF ADMINISTRATIVE LAW JUDGES HOUSED IN AN INDEPENDENT CORPS VERSUS

ALJS HOUSED IN THE AGENCIES?

4. YOU MAKE THE FOLLOWING ASSERTION IN YOUR STATEMENT IN THE LAST PARAGRAPH ON PAGE 6:

> LAST, THE PURPORTED ATTRACTION OF HEARING A GREATER VARIETY OF CASES IGNORES THE POLICY THAT CERTAIN TYPES OF MATTERS SHOULD BE ADJUDICATED BY ADMINISTRATIVE AGENCIES WITH PARTICULAR

EXPERTISE IN THE SUBJECT MATTER AND POLITICAL ACCOUNTABILITY. THUS, THIS BENEFIT, IF IT IS ONE, CAN BE ACHIEVED ONLY BY SUBVERTING THE ADMINISTRATIVE PROCESS.

COULD YOU EXPLAIN WHAT YOU MEAN BY "POLITICAL ACCOUNTABILITY?"

5. AGENCIES EMPLOY ALJS FROM A LIST OF QUALIFIED CANDIDATES SUBMITTED BY OPM. DOES THE PROCESS OF SELECTIVE CERTIFICATION AS IT IS NOW USED ENSURE AGENCY EXPERTISE OR AGENCY LOYALTY?

6. HOW MANY DECISIONS WERE FILED IN THE PAST 12 MONTHS IN YOUR AGENCY, AND WOULD YOU PLEASE INDICATE WHERE THEY WERE FILED?

SENATOR GRASSLEY'S

QUESTIONS FOR MARY ELLEN BITTNER

1. One rationale for S. 950 is to remove the perception of unfairness which exists because ALJ's are under the employment of the agency whose actions are being judged. Can you comment, on behalf of yourself and other ALJ's in the forum, on the extent of this perception? Have you found that litigants generally lack respect for the current ALJ system because of this perception?

2. Judge Victor Palmer, in his testimony, stated: "OPM (Office of Personnel Management), by its actions, does little to attract the most qualified candidates (for ALJ's), and it customarily demonstrates an institutional resistance to the treatment of these positions as judicial in nature." In your opinion, would the ALJ's in the Corps, if it were established, be more or less qualified than the ALJ's under the present system?

3. Judge Palmer cited a study which showed that 69% of ALJ's who were surveyed favored a self-administered corps. The study also showed that only 8 1/2 % opposed the creation of a ALJ Corps. Do you believe that a majority of ALJ's would support S. 950 as it is written? Do you know of any additional considerations which may have arisen since that survey in 1974 which would change the collective opinion of ALJ's?

THE FORUM

of United States Administrative Law Judges

* *

P.O. Box 44337
Washington, D.C. 20026-4337

President
Mary Ellen Bittner
First Vice-President
Alan W. Heifetz
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Michael O. Miller
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William B. Devaney
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David W. Miller

SEP -3 [illegible]

September 1, 1987

Honorable Howell Heflin
Chairman
Subcommittee on Courts &
Administrative Practice
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Chairman Heflin:

Enclosed is Forum's response to your and Senator Grassley's questions of August 17, 1987, which we ask to have included in the record. As indicated in my letter to you of August 21, 1987, I was in New Orleans last week and thus could not supply the information to you until today; I hope that this delay did not inconvenience you, Senator Grassley, or the Subcommittee staff.

Again, thank you for this further opportunity to express Forum's position on S. 950.

Sincerely,

Mary Ellen Bittner

Mary Ellen Bittner

Enclosures

RESPONSES OF THE FORUM
OF UNITED STATES ADMINISTRATIVE LAW JUDGES
TO QUESTIONS FROM SENATOR HEFLIN
AND SENATOR GRASSLEY

Questions Posed by Senator Heflin

1. Forum has 79 active and 3 emeritus (retired) members. The numbers of active members by agency are as follows:

United States Coast Guard	1
Commodities Futures Trading Commission	1
Drug Enforcement Administration	2
Environmental Protection Agency	1
Federal Energy Regulatory Commission	16
Federal Labor Relations Authority	7
Federal Mine Safety and Health Review Commission	7
Dept. of Housing and Urban Development	1
Dept. of the Interior	2
National Labor Relations Board	35
National Transportation Safety Board	2
Occupational Safety and Health Review Commission	1
Securities and Exchange Commission	2
United States Postal Service	1

Forum's three emeritus members were formerly administrative law judges at the Interstate Commerce Commission, the Federal Labor Relations Authority, and the Federal Mine Safety and Health Review Commission.

2. Forum considers the problems of decisional independence of the administrative law judges at the Social Security Administration a matter of significant concern, irrespective of the proportion of SSA judges to the total number of federal administrative law judges. However, since judges at other agencies do not have those same difficulties, we see no reason to establish a new agency to house all federal administrative law judges. In our view, the problems at the Social Security Administration stem from the fact that the same officials who are responsible for denying disability claims in the first place review administrative law judges' decisions on claimants' appeals of those denials. Establishment of a separate corps of administrative law judges would do nothing to solve this problem, which can and should be addressed by legislation to separate the function of reviewing administrative law judges' decisions in the Social Security Administration from that of denying claims in the first instance.

The Administrative Procedure Act provides, among other things, that an administrative law judge may not consult a party on a fact in issue unless all parties are notified and given an opportunity to participate in that discussion, that an administrative law judge may not be responsible to or supervised by someone who performs investigative or prosecutorial functions for an agency, and that any agency employee who is engaged in such functions in any case may not be involved in the agency's decision or review of that case. Significantly, the Administrative Procedure Act also provides that administrative law judges may be removed only for good cause. Their classifications and pay are established by the Office of Personnel Management and not by the agencies which employ them. In addition, administrative law judges are separated from other agency personnel,

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are assigned cases in rotation insofar as practicable, and must make their decisions on the record. Further, they may disqualify themselves from cases where they believe they have a potential conflict of interest and are protected from assignment to other agency duties. If additional protections, such as those included by Congress in the legislation administered by the National Labor Relations Board, are appropriate, then the statutes relevant to other agencies should be amended to include those measures.

3. Forum does not see any difference in the decisional independence of administrative law judges housed in a corps and those housed in the various agencies. The only problem of decisional independence is at the Social Security Administration, and, as noted above, that problem would not be solved by establishment of a corps.

4. The phrase "political accountability" as used in Forum's July 21, 1987, position statement refers to the accountability of the agencies, not the administrative law judges, and has nothing to do with the decisional independence of administrative law judges. Rather, the phrase refers to the fact that federal agencies are accountable to the Congress and the President for performance of the agency's mission. Both subject matter expertise and the power to allocate resources to the agency's cases are necessary in order for agencies to carry out their missions successfully.

Under S. 950, the Council of Division Chief Judges would have total power to allocate the Corps' resources. Thus, the Council could, if it so chose, decree that all of the judges of the Corps be assigned to hear black lung cases in order to alleviate the backlog at the Department of Labor, and that cases from some, or even all other agencies would have to wait for hearing until that backlog was reduced. Indeed, such a result of a Corps was apparently intended by Congressman Murphy when he introduced H.R. 2726 on June 18, 1987. [See, Congressional Record of June 19, 1987, at E 2516.]

Obviously, the loss of authority to allocate judges and support staff to their cases would have an enormous impact on the agencies. Hearing and deciding cases is a crucial aspect of the mission of many agencies, such as the National Labor Relations Board, the Federal Labor Relations Authority, and the Federal Mine Safety and Health Review Commission. Without the power to assign judges to hear cases, these agencies would have no control over when cases would be heard and decided, and would be unable to carry out their missions. It is noteworthy, on this issue, that although S. 950 initially establishes divisions based on areas of substantive expertise, the Council is empowered to reconstitute, abolish, or alter those divisions at will. Thus, the possibility that the Council would allocate all the Corps' resources to one type of case is clearly envisioned by this bill.

5. Selective certification of candidates for administrative law judge positions has not been used for several years. When it was employed, selective certification helped those agencies which required administrative law judges with specialized expertise to obtain them.

6. During the twelve-month period beginning September 1, 1986, and ending August 31, 1987, the administrative law judges at the Drug Enforcement Administration issued 42 opinions. Until mid-February 1987, there was only one judge in the agency; thus he issued the vast majority of these opinions.

Cases coming before the administrative law judges include (1) rulemaking proceedings, raising issues such as whether to add or delete a given drug from one of the five schedules of controlled substances, the restrictions to be placed on the importation of controlled substances into the United States, and the setting and modifying of annual aggregate quotas for production of certain controlled substances; and (2) adjudicatory proceedings involving the setting and modifying of allocations to individual manufacturers of portions of the total quotas, the registration of importers, exporters and manufacturers of certain controlled substances, and the registration of physicians, other health care professionals, and pharmacies to handle controlled substances.

The hearings in rulemaking proceedings run about eight to ten days, while hearings in adjudicatory proceedings involving registration of practitioners typically take between one and five days. The administrative law judges' opinions are submitted directly to the Administrator of the Drug Enforcement Administration, with copies maintained in our office. The Administrator's final order is the final agency determination, which is published in the Federal Register and may be appealed to a United States Circuit Court of Appeals.

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Questions Posed by Senator Grassley

1. From my own experience (comprising over six years as an administrative law judge with the National Labor Relations Board, but a mere six months as an administrative law judge with the Drug Enforcement Administration) I can state unequivocally that my employment by the agency whose cases I hear has never caused any litigant to perceive that he was being treated unfairly. I know of no experience to the contrary of any members of Forum. Indeed, it is noteworthy that the National Association for the Advancement of Colored People has testified repeatedly that enactment of S. 950 would be detrimental to private litigants in administrative proceedings. Similarly, the Council of the Section of Labor and Employment Law of the American Bar Association, representing primarily attorneys in private practice, has vigorously opposed establishment of a central corps of federal administrative law judges, and the Council of the ABA's Section of Administrative Law, also primarily attorneys in private practice, passed a resolution in April 1985 stating that it "opposes a government-wide corps." If there were any real perception of unfairness to private parties in administrative proceedings outside of the Social Security Administration, and if establishment of a corps would eliminate that problem, these groups would not be opposing this bill.

2. Establishment of a Corps would do nothing to change the qualifications of administrative law judges. If S. 950 were enacted, candidates for administrative law judge positions would go through the same qualification process currently in effect.

3. As far as I am aware, the most recent survey of administrative law judges on their feelings about a Corps was that undertaken by the Federal Administrative Law Judges Conference of its members in 1983. The specific question was whether the respondents thought that FALJC should support S. 1275, one of the earlier bills to establish a Corps. The tabulation of the results of that survey is attached, and shows that although the respondents from the Social Security Administration and the Department of Labor heavily supported the bill, a majority of the judges from other agencies opposed formation of a Corps.

Based on my conversations with judges serving in various agencies and my understanding of the issues facing the administrative law judge community, it appears to me that a majority of the administrative law judges at the Social Security Administration and the Department of Labor continue to be in favor of establishment of a central Corps and that a majority of the judges at other agencies oppose it.

A number of factors relevant to administrative law judges' views on a Corps have changed since the 1974 study cited by Judge Palmer. Perhaps the most important of these is the fact that the caseloads of some agencies have increased or decreased dramatically, with resulting hiring of judges in some instances and reductions in force of the judge complement in others. Some judges perceive the Corps as insurance that any declines in the caseload will not result in further reductions in force.

Pay is another significant factor. According to Judge Barlow's position statement (at p. 13) S. 950 provides that all administrative law judges would be paid the same salary, presumably the equivalent of Grade GS-16. Currently, most of the 650 administrative law judges at the Social Security Administration are at Grade 15, while the vast majority of the judges at other agencies are Grade 16. Thus, some judges may support the bill because it would likely provide a salary increase to them. If such an increase is desireable and appropriate, it can easily be enacted without the disruption to the administrative process imposed by creating a Corps of administrative law judges. (It should be noted at this point that the Department of Health and Human Services is in the process of hiring GS-14 judges to hear certain Medicare cases. These judges would be included in a corps and would be at the same salary level as all other judges.)

On behalf of Forum, I hope the above responses provide the information sought.

Dated: September 1, 1987

Respectfully submitted,

Mary Ellen Bittner

Mary Ellen Bittner, President
Forum of United States Administrative
Law Judges

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TABULATION OF FALJ REFERENDUM ON QUESTION: SHOULD THE FEDERAL ADMINISTRATIVE LAW JUDGES CONFERENCE SUPPORT S. 1275?" AS FOLLOWS:

Agency		Yes	No
AGRI		3	0
ATF		0	0
CAB		1	0
CFTC		1	0
CG		5	2
DEA		0	1
DOL		26	6
EPA		2	2
FCC		3	3
FDA		1	0
FERC		2	9
FLRA		1	5
FMC		0	3
FMSHRC		1	7
FTC		2	2
HHS		205	6
HUD		1	0
ICC		3	1
INT		2	1
ITC		0	0
MSPB		0	0
NLRB		10	20
NOAA		0	0
NRC		3	0
NTSB		1	3
OSHRC		3	3
SBA		1	0
SEC		2	1
USPS		2	1
	TOTAL	281	76

QUESTIONS OF SENATOR HEFLIN FOR ALTHEA T. L. SIMMONS

1. IN YOUR TESTIMONY YOU INDICATE THAT YOUR ORGANIZATION HAS HAD THE MOST CONTACT WITH SOCIAL SECURITY AND NLRB ADMINISTRATIVE LAW JUDGES. YOU EXPRESS FEAR THAT AN INEXPEREIENCED ADMINISTRATIVE LAW JUDGE MAY UNFAIRLY IMPACT UPON THE PARTIES.

I REALIZE THAT YOUR MAIN CONCERN IS THE FAIRNESS OF THE PROCESS FOR THE LITIGANTS. IS IT NOT EQUALLY IMPORTANT THAT AN EXPERIENCED ADMINISTRATIVE LAW JUDGE BE ABLE TO MAKE DECISIONS IN AN ATMOSPHERE FREE OF UNDUE INFLUENCE?

2. A RECURRENT THEME THROUGHOUT YOUR TESTIMONY FOCUSES ON THE POSSIBLE NEED TO RELOCATE ADMINISTRATIVE LAW JUDGES TO ACHIEVE AN EFFICIENT AND COST-EFFECTIVE SYSTEM.

YOUR STATEMENT INDICATES SOME CONCERN THAT THE COUNCIL MIGHT USE THE AUTHORITY TO TEMPORARILY DETAIL ADMINISTRATIVE LAW JUDGES IN A PUNITIVE FASHION. WHAT IS THE BASIS FOR YOUR CONCERN?

ADDITIONAL QUESTIONS OF SENATOR GRASSLEY FOR ALTHEA T. L. SIMMONS

1. In his testimony, Judge Victor Palmer testified that the ALJ Corps would create cost savings by the centralization of ALJ's and staff. Do you believe this is possible without compromising the Corps' ability to meet the needs in all parts of the country?

2. As you know, the Fair Housing Bill (S. 558) permits ALJ's from the Department of Housing and Urban Development (HUD) to hear and make awards in housing discrimination cases. Are you comfortable with HUD deciding these important civil rights cases?

3. Under S. 950, ALJ's from other agencies may be called on to decide fair housing cases. Are you concerned that these judges may lack the background required to rule on housing discrimination based on race, religion, age, sex, handicap, etc?

Answers of Althea T. L. Simmons, on behalf of National Association for the Advancement of Colored People, to Senator Heflin's questions

1. Yes. It is important that an experienced administrative law judge be able to make decisions in an atmosphere free of undue influence. We believe that that is what is now occurring at virtually all administrative agencies. The Social Security Administration is the notable exception. However, we believe that the difficulties encountered in that agency should be addressed in legislation particularly designed to resolve those problems. While we understand that the establishment of a unified ALJ corps will separate SSA judges from that agency and any undue institutional pressure or influence, we are unconvinced that the bureaucracy of a large, unified corps of judges is necessary to achieve that end.

2. Since the leadership of the proposed corps is politically appointed and eventually self-perpetuating, the potential exists for assignment of judges based upon considerations other than expertise, economy or efficiency.

Answers of Althea T. L. Simmons, on behalf of National Association for the Advancement of Colored People, to Senator Grassley's questions

1. No. Although Judge Palmer has asserted that consolidation would achieve cost savings, his assertions have not been documented and are not based on objective fact. Thus, we doubt that the centralization proposed in the bill would effectuate cost savings.

However, assuming there is statistical support which demonstrates some cost savings by consolidating certain functions in Washington, that does not assure that regional needs will be met as well. Implicitly under this bill, existing regional offices would likely be abolished or consolidated, with the result that present levels of responsiveness to those affected would be seriously impaired without recourse to their elected representatives.

2. Yes. As a matter of fact, we are actively supporting the Fair Housing Bill.

3. Yes. While we believe that there are many ALJ's from other agencies, such as the NLRB and the FLRA, who have the requisite background and experience to rule on discrimination in general, we are concerned (1) that there are others who do not have experience presiding over contested cases involving complex issues of fact and which require credibility determinations; and (2) that since housing discrimination cases must be decided expeditiously, a large bureaucracy will render ineffective the statutory purpose of the Fair Housing Bill because cases cannot be timely assigned to individual judges nor is there any assurance that those cases will be given the priority we believe they deserve.

Senator HEFLIN. I will probably submit some written questions. Senator Grassley.

Senator GRASSLEY. I have no questions of this panel, Mr. Chairman.

Senator HEFLIN. Senator Thurmond.

Senator THURMOND. I want to express my appreciation to you all for appearing here. I have no particular questions at this time.

Senator HEFLIN. Thank you. We appreciate your testimony.

Next is a panel of two: Judge Victor W. Palmer, acting chief administrative law judge, Department of Agriculture; and Judge Julius Johnson, administrative law judge, Department of Labor, from here in Washington, DC.

Judge Palmer, your name is first on my list. If you would start, we would appreciate it.

STATEMENTS OF A PANEL CONSISTING OF VICTOR W. PALMER, ACTING CHIEF ADMINISTRATIVE LAW JUDGE, U.S. DEPARTMENT OF AGRICULTURE, WASHINGTON, D.C.; AND JULIUS JOHNSON, ADMINISTRATIVE LAW JUDGE, U.S. DEPARTMENT OF LABOR, WASHINGTON, DC

Judge PALMER. Thank you, Mr. Chairman. First, let me say this is the third time I am appearing before this subcommittee in respect to the proposed legislation, and I ask that my testimony at the previous two hearings be incorporated.

Senator HEFLIN. Without objection, it will be.

Judge PALMER. I also noted that Ms. Simmons mentioned an article by a colleague of mine, Judge Zankel, that appeared in the Western New England Law Review. I wrote one that appeared in that particular issue, too, on the same subject in which I disagreed with him and I would ask that that be incorporated.

Senator HEFLIN. Without objection, so ordered.

Judge PALMER. Let me do this. I have a written statement and I presume it will be incorporated.

Senator HEFLIN. It will.

Judge PALMER. What I would like to do is address some of the comments that have been made. First, let me say that the corps is definitely needed. As one of my colleagues pointed out, we have heard these very same objections raised in every State that has created what the States call a central panel system.

In every one, there was concern that expertise might be lost, that the agency would lose control over its dockets, that it would lose control over its ability to render policy. In each of those States, those concerns have been proven untrue.

Judge Harves is here today from the State of Minnesota, which has one of the finest central panel systems in America. The other one that we heard of today is the one in New Jersey where they had a blue ribbon commission examine what happened after the central panel came into being.

They found that the quality of the decisions that were being entered for the agencies improved. They found that the morale of the judges improved. They found that the cost of delivering adjudicatory services for the agencies went down. Everywhere it has been a success, and I have no reason to believe that it will not be a success in the Federal Government.

The problems at the Social Security Administration are always mentioned because it is the largest agency and employs the most judges, and it deals by written memorandum because it has so many judges. You cannot woodshed a judge as easily when you have 700 of them, but disturbing incidents have taken place at other agencies.

The law review article that I mentioned identifies some of those incidents. I shall not now list each of them. It is a painful subject for us to admit that there are chinks in the APA's armor that was designed to protect the decisional independence of administrative law judges.

The protective concept of the judge being supervised by someone other than an agency prosecutor was built into the APA, but my review of the study made by Congress at that time and the two committees that were looking at the problem at that time showed that there were grave doubts then that this protective device would be completely sufficient. Problems have arisen.

One of the great protections that the APA was supposed to provide was that cases would be assigned on a rotation basis, simple rotation. My colleagues who were ALJ's in those days thought that that meant there would be a mechanical rotation so that there would be no opportunity for the agency to pick and choose judges in terms of their known predilections when making a case assignment.

They went to court over that issue and the Supreme Court in the *Ramspeck* decision held that an agency does have the right to assign cases on the basis of its understanding of the experience of the judge. That opened a wide, wide door.

The situation that was described by Judge Barlow concerning Judge Fenton involved the *PATCO* case arising out of the air controllers' strike. Judge Fenton was assigned to that case after conversations with the agency heads, and he has written letters explaining his participation in that.

I am not in any way being critical, but I just say that from the standpoint of the public there does seem to be something deficient in a system that allows case assignments to be made in that way, and that is one of the problems that the corps bill would resolve.

Let me now discuss some of the questions that have been posed as to interdivisional uses—one of the things that I had in mind that could be readily done on an interdivisional basis would be the cross-assignment of the kinds of simple cases that arise at agencies.

We have at the Department of Agriculture, for example, under a series of statutes involving plant quarantine and animal quarantine, cases in which, if somebody comes across the border with a couple of undeclared tamales in their suitcase, they are cited by an inspector and they are subject to a hearing by an administrative law judge.

It seems to me to be very cost-inefficient to send one of our five judges from Washington out to Nogales or wherever they may be to hear one of those cases. I think a Social Security judge out in the field could hear that kind of case. Those are examples of the kinds of things that could take place that would be cost-efficient.

May I just make one other statement and then I will stop? Ms. Bittner indicated that my written statement was misleading when it referenced an agency appearing before the judge as a party. Yes, that is very true; the agency appears before us as a party.

The agency is employed by someone that employs us, and although there is a distinction in the supervision of who supervises the judges in the agency, to the public it is a terrible thing. I run into it all the time where someone who is represented by an attorney who has not been involved in administrative proceedings or represents himself will come over to me and say, judge, I understand that the gentleman at the table over there that is prosecuting me is employed by the Department of Agriculture, but who sends you your paycheck? Who employs you? And I have to say the Department of Agriculture. I assure you that they immediately lose confidence in that hearing.

Thank you, sir.

[Submissions of Judge Palmer follow:]

MEMORANDUM

TO: SUBCOMMITTEE AND TO OTHERS WHOM IT MAY CONCERN

FROM: JUDGE VICTOR PALMER

DATE: JULY 21, 1987

Because of a recent change of officers in the Federal Administrative Law Judges Conference, my current statement has not been adopted as its official position.

I have been authorized by the Federal Administrative Law Judges Conference to express its continuing support of S. 950, and I also represent other proponents of the bill.

* * *

STATEMENT OF

JUDGE VICTOR W. PALMER

FOR

THE FEDERAL ADMINISTRATIVE LAW JUDGES CONFERENCE

BEFORE THE

SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE AND PROCEDURE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

ON

THE ADMINISTRATIVE LAW JUDGE CORPS ACT

(S. 950)

July 21, 1987

I. Introductory Remarks

Chairman Heflin, it is my great personal pleasure to appear before you once again, to support your bill to establish an independent Corps of Federal Administrative Law Judges.

Today, I appear as the representative for the Federal Administrative Law Judges Conference. However, I also serve as Chair of the National Conference of Administrative Law Judges, a constituent organization within the American Bar Association's Judicial Administrative Division, which has developed a monograph in support of your bill that is being furnished the Subcommittee along with my statement.

The chief benefits your bill, S.950, shall achieve are:

A. Firstly, it will provide a most needed new structure for the supervision and management of administrative law judges. Under the present system, each judge is a subordinate employee of the agency whose cases the Judge hears - the agency employer always has a real and substantial interest in the outcome of every case the judge decides, and very often is a named party in individual cases. The proposed Corps would replace this system so that all federal administrative law judges will be managed and supervised by a collegially constituted body of administrative law judges with individual judges assigned to specialized divisions. This new structure is needed to:

(1) Guarantee, and be perceived by the public as guaranteeing, the neutrality and impartiality of administrative law judges as fact-finders by fully insulating them from influence or pressures exerted in the guise of day-to-day management by the agencies whose cases they hear.

(2) Assure that administrative law judges will be held accountable for any misconduct or neglect of duty by a supervisory body that cannot be challenged on the basis that it is really a disgruntled party of interest, attempting to punish a judge for entering a decision not to its liking.

(3) Place the management of all administrative law judges in the hands of experienced judges who have taken the same oath of office and whose understanding and appreciation of the duties and responsibilities of the administrative law judge office comes from actual performance of those duties and responsibilities. Other legislative proposals you may be asked to consider would instead leave control of the judges in the hands of clerks and managers who are without this understanding and appreciation of the judicial function.

B. Additionally, the proposed Corps will achieve other benefits that bills restricted to Social Security cases cannot.

The proposed Corps will make the administrative law judge system more efficient, will better assure that every agency will have judges adequate to its hearing needs, and will save tax dollars. Passage of the Corps bill can attain each of these improvements while preserving and enhancing the best aspects of the present system; most notably, merit selection and the application of expertise in agency decisionmaking.

That concludes my thumbnail sketch of the principal benefits and advantages of the Administrative Law Judge Corps bill and I would now ask that my prepared statement be made a part of the record as fully as if read. I also request that the previous testimony that I and other proponents gave in 1983 and 1986, to the Subcommittee also be made part of this hearing record. I ask too that the monograph attached to my statement by Judge Earl Thomas prepared on behalf of the American Bar Association be accepted as part of the testimony presented in support of enactment of S. 950.

II. The Essential Reasons for Establishing a Corps

We believe that the total separation of administrative law judges from the 29 Executive Departments and agencies, where they are presently employed, is the essential first step to meaningful, regulatory reform.

Until this is done, Americans will never be convinced that they are being given fair hearings by impartial judges. Many of the employing Departments and agencies regularly appear before the judges as party litigants. The agency employing the largest number of administrative law judges is perceived to be pursuing policies designed to thwart the very claims for statutory entitlements that come before the judges for resolution. Neither circumstance engenders public trust and confidence.

The past president of the American Bar Association, Bernard G. Segal, stated the problem in a nutshell: 9/ *

> Consider, for example, the unavoidable appearance of bias when an administrative law judge, attached to an agency, is presiding in litigation by that agency against a private party. One can fill the pages of the United States Code with legislation intended to guarantee the independence of the administrative law judge; but so long as

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* The first eight footnotes were developed for an earlier draft that this statement replaces; however, since they contain references that are helpful to researchers, they have been retained.

> that judge has offices in the same building as the agency staff, so long as the seal of the agency adorns the bench on which that judge sits, so long as that judge's assignment to the case is by the very agency whose actions or contentions that judge is being called on to review, it is extremely difficult, if not impossible, for that judge to convey the image of being an impartial fact finder."

The establishment of a unified corps of administrative law judges would do more than any other single act to strengthen public confidence in our federal administrative system which must be both fair and appear to be fair. It is also the key to more efficient and less costly adjudication.

Statistical data from those states which now employ administrative law judges as members of central panels, show the savings that do result when the judges are brought together in a single corps.

At present, federal administrative law judges are employed by 29 separate Departments and agencies, each replicating the others in the maintenance of Clerk's offices for the docketing of cases, filing systems, case tracking systems, and systems for preparing statistical reports. They each employ separate staffs of clerks, stenographers, para-legals and other support personnel. Some have modern office equipment that is under-used, others have none. Modern computerized systems for docket management, including the tracking of cases and the preparation of the reports to which Congress and the public are entitled, are already in place both at the Department of Labor and the National Labor Relations Board, and either system would be sufficient to take care of the entire needs of the corps that this legislation would establish. But the greatest savings would come about from increased efficiencies and flexibility in the assignment of judges to cases.

In the absence of an ALJ Corps, there is no practical method for assigning judges at agencies where caseloads are dwindling to the work of those agencies with backlogs. 10/ Programs to loan judges, agency-to-agency, have encountered several practical problems. Should the lending agency continue to carry the judge on its payroll? How much should the borrowing agency pay as "rent" for the judge? If work suddenly picks up at the lending agency, can it retrieve the then needed judge? Moreover, when an agency admits that its own need to hold hearings has diminished to the point that the ALJs in its employ are available for a loan program, the agency exposes its judges, its attorneys and the rest of its hearing process personnel to reduction-in-force actions and budgetary reductions.

The unified corps will be able to adjust the assignment of judges to cases with better correlation to the variuos peaks and valleys of individual agency caseloads. This would eliminate agency overstaffing to meet surges in adjudicative activities in order to avoid backlogs and constituent complaints.

Furthermore, the bills* specifically authorize federal courts as well as agencies to refer certain types of proceedings requiring hearings to the Corps of Administrative Law Judges. This will identify ALJs as a ready resource to meet pressing problems. Over 1,000 highly trained and experienced administrative law judges will thus become identified as available to assist the Courts and every government agency desiring a decision by neutral experts based on a hearing record. As existing caseloads are more evenly distributed among administrative law judges, they will be able to absorb such added duties without incurring added costs.

These bills, then, would accomplish the following significant objectives:

(1) The actual fairness of administrative adjudications would be guaranteed;

(2) The appearance of ALJ bias would be eliminated;

(3) Significant cost savings would result;

(4) Administrative law judges would be employed more efficiently;

(5) Administrative law judges would be made instantly available to every agency, and would be identified as available to assist, when requested, our overloaded federal courts.

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* Companion bills to S. 950, are also before the House Judiciary Committee for its consideration; namely, H.R. 1554 and H.R. 2726.

The administrative law judge community, as represented by their major professional associations, supports these objectives

Administrative law judges support these bills because they will accomplish each objective without disrupting any of the time-proven attributes and safeguards already part of the administrative system. A minority of administrative law judges do not favor the enactment of these bills and would instead preserve the status quo. But it should be noted that when the merits of these bills have been debated in our community, the debates have never centered on whether enactment would improve ALJ status or compensation or whether some ALJs might be caused to work harder. ALJ support and opposition to the bills is based on individual perceptions of the due process requirements that are applicable to the hearings we conduct.

None of the bills change the current decisional relationships between the judges and agencies. Agency review of decisions by administrative law judges would continue. Each agency would remain the final arbiter of its own policy subject only to judicial review as presently provided under the Administrative Procedure Act (the APA).

Most importantly, the system now in place for the merit selection of administrative law judges is left intact. The system is unique and should not be weakened in any way. It provides that applicants for administrative law judge positions must submit to rigorous written and oral examinations conducted by the Office of Personnel Managment to demonstrate their legal expertise. They are further required to produce proof of at least seven years experience as judges or trial lawyers handling complex cases.

Individual judges would continue to be selected on this basis. They would be assigned, however, not to individual Departments and agencies, but to specialized divisions within the Corps, in keeping with their particular fields of legal expertise.

At this point, an essential underlying question requires address. Why now, nearly 40 years after the enactment of the Administrative Procedure Act, should administrative law judges b separated from agencies?

III. Changes in the Types of Hearings Conducted

In 1947, over 60% of administrative hearings involved ratemaking, licensing and other forms of rulemaking by the various economic regulatory agencies. In 1982, those agencies accounted for less than 7% of the hearings conducted by administrative law judges. Rulemaking hearings conducted for the consideration of regulatory agencies in their formulation of policy for proscriptive application on an industry-wide basis, occupies a shrinking percentage of the federal administrative judiciary. 11/ Today, an administrative law judge is more likely to hear an enforcement action or a claim for social security benefits. In either case, his or her functions are essentially judicial and are inconsistent with continued status as an agency subordinate.

A. Civil Penalties and Other Administrative Sanction Cases

Accusatory actions by agencies seeking civil money penalties to enforce statutory provisions and administrative regulations were rarely the subject of administrative hearings in 1947. Even as recently as 1965, it could still be said that administrative authority to assess penalties was "rarely conferred" and that "it (was) a close question whether there (was) sufficient advantage in conferring" such power. 12/ But by 1971, 7 executive departments and 13 independent agencies had collected well in excess of $10 million in penalties during the fiscal year, in over 15,000 cases. The Administrative Conference of the United States (ACUS) reported this as "an important and salutary trend." 13/ It urged the advantages of the "administrative imposition system" stating:

> "The already critical overburdening of the courts argues against flooding them with controversies of this type, which generally have small precedential significance." 14/

ACUS went on to recommend that federal agencies "should evaluate the benefits which may be derived from the use (or increased use) of civil money penalties as a sanction." 15/ This 1972 ACUS recommendation encouraged agencies to impose civil money penalties through APA adjudications on the record, not subject to de novo reviews by United States District Courts, but reviewed instead by United States Courts of Appeals under the APA's substantial evidence rule. 16/

In 1976, the Supreme Court held such enforcement procedures to be constitutional. 17/

By 1979, ACUS was able to report:

> "The civil money penalty has become one of the most widely used techniques in the enforcement programs of federal administrative agencies."
>
> * * * *
>
> "Since adoption of that Recommendation in 1972, the use of civil money penalties in general and of administratively imposed civil penalties in particular has increased significantly, and the constitutionality and desirability of administratively imposed penalties has been widely recognized." 18/

To the growing list of accusatory proceedings conducted by administrative law judges must be added those that enforce statutes by the imposition of sanctions having even harsher consequences: revocation or suspension of a license to engage in a business or profession subject to federal control, withdrawal of inspection services required to sell various products (such as meat) interstate, and the entry of findings which preclude future industry employment. The continued status of administrative law judges as employees of those Departments and agencies which now actively appear before them as prosecutors cannot be justified on any basis. 19/

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. . . .
>
> This Court has said . . . that 'Every procedure which would offer a possible temptation to the average man as judge . . . not to hold the balance nice, clear, and true between the State and the accused denies the latter due process of law.'

> Tumey v. State of Ohio, 273 U.S. 510, 532. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.' Offutt v. United States, 348 U.S. 11, 14. In re Murchison, 349 U.S. 133, 136 (1955).

B. Claims for Social Security Benefits

In 1947, only 13 administrative law judges heard cases involving the Social Security laws. Today, nearly 700 are so assigned. In 1947, 63.8% of the federal administrative judiciary conducted hearings for economic regulatory agencies, and only 6.6% for the Social Security Administration. That pattern has completely reversed with 67.3% of the judges now hearing Department of Health and Human Services (HHS) cases, and only 6.7% conducting hearings for the economic regulatory agenices. 20/.

This is because the requests for hearings by administrative law judges skyrocketed. They increased from 121,500 in fiscal year 1974 to 320,000 in fiscal year 1982. 21/

This phenomenal increase in requests for hearings was the direct result of greater initial denial of applications by state agencies, and aggressive actions taken to terminate previously granted benefits. Using fiscal years 1976 and 1980 as references, the denial rates at the state agency level rose from 41.6% to 60.4% for initial denials, and the reconsideration denial rate increased from 72.3% to 82.2%. In 1982, benefits were cut off from 195,000 beneficiaries after the highest number of reviews of continuing eligibility in the program's history, 471,337.

The increased rates of denial similarly overburdened the federal courts at both the district and appellate levels. At the beginning of 1982, there were 19,000 cases pending and new cases were being filed at the rate of 9,000 every year. Since the federal courts have been able to render decisions in no more than 4,600 social security cases per year, an overwhelming backlog of social security cases now plagues the federal courts.

The explosion in the number of HHS cases thrust upon the courts and the administrative judiciary was the direct result of changes in agency policy, implemented through more restrictive standards for granting disability benefits claims. These restrictive standards differ from those applied by the administrative bench and the federal courts. They were ruled to be "arbitrary, capricious, irrational and an abuse of discretion" by U. S. District Court Judge Earl Larson who ordered 20,000 mentally ill people in the Midwest to be restored to the disability rolls. Mental Health Association of Minnesota v. Schweiker, 554 F.Supp. 157 (D. Minn., December 1982).

The Social Security Administration disregarded admonishments that its refashioned standards were contrary to governing organic law and imposed a policy of "non acquiescence" upon its judges, directing them to disregard court decisions with which it disagreed. 22/

Moreover, as the judges' employer, the Social Security Administration instituted agency review of the decisions by those judges who had granted more than the "average" number of appeals by claimants. 23/ The judges came to believe they were being pressured by SSA to deny claims, 24/ and filed a lawsuit 25/ to stop such practices. The District Court Judge who heard their case agreed that the actions of the agency showed "an unjustifiable preoccupation with allowance rates, to the extent that ALJs could reasonably feel pressure to issue fewer allowance decisions. . . . 26/ The District Court Judge further found that SSA's "insensitivity to that degree of decisional independence the APA affords to administrative law judges . . . could have tended to corrupt the ability of the administrative law judges to exercise that independence in the vital cases that they decide." 27/

However, on the basis of assurances that these practices had been permanently ended, the lawsuit was dismissed. But Professor of Political Science, Donna Price Cofer, found when she made current her comprehensive survey of the SSA hearing process, that similar practices have begun again: 28/

> "(B)ureaucratic pressures upon the ALJs continue to be reality. . . . The use of terminology such as 'goals', 'performance expectations,' and 'performance feedback' (in current memoranda) seems very much like the terms 'targeting', 'goals', and 'behaviour modification', which the federal district court judge pointed to . . . as phrases used by the Agency in the past that could corrupt the ability of ALJs to make independent decisions."

Professor Cofer warns: 29/

> "(T)here are consequences to be anticipated in placing production quotas in the hands of politically-sensitive administrators. Such measures have critically impaired the credibility of the disability determination process in the past, a process which is designed to protect an insurance trust fund to which working Americans involuntarily contribute."

Like Professor Cofer, our concern is with principles of fundamental justice. These ongoing agency practices undercut the right of every disability claimant to a determination by an impartial judge. They subvert the Supreme Court holding that administrative law judges have judicial functions by making them mindful of the consequences of their decisions to the agency and its budget when their exclusive concern should be the merits of each individual case. Butz v. Economou, 438 U.S. 478 (1978); Nash v. Califano, 613 F.2d 10 (2d Cir. 1980); Benton v. United States, 203 Ct. Cl. 263, 488 F.2d 1017 (1973).

Claimants are made to suffer the abridgement of fundamental protections guaranteed them by the due process clause of the Constitution. That is the ultimate cost of such agency policies and practices.

> Indeed, one might fairly say of the Bill of Rights in general and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy which may characterize praiseworthy government officials. Stanley v. Illinois, 405 U.S. 645, 656 (1972).

IV. OPM as Protector of the ALJ Program

The Administrative Procedure Act contemplated that the Civil Service Commission, now the Office of Personnel Management, would protect the independence of administrative law judges. The Supreme Court reiterated this responsibility in Ramspeck v. Trial Examiners Conf., 345 U.S. 128, 139 and 142 (1953).

The selection process as currently administered by OPM has become a praiseworthy model for making judicial appointments that should be retained. But, OPM has otherwise failed to distinguish itself in fulfilling its responsibility to the ALJ program.

Lawyers seek to become administrative law judges because they regard the positions to be judicial and intellectually challenging. OPM has the responsibility for attracting and retaining the most qualified lawyers as applicants for administrative law judge positions. However, OPM, by its actions, does little to attract the most qualified candidates, and it customarily demonstrates an institutional resistance to the treatment of these positions as judicial in nature.

In 1983, OPM undertook a governmentwide classification study to link administrative law judge positions to those held by government attorneys who perform "hear and decide type work." 30/ Such a linkage would seriously impair the public perception of administrative law judges as impartial triers of fact who are independent and institutionally dissimilar to the agency attorneys who appear before them. Particularly disturbing to the judges and the legal community were comments by OPM officials that "egregious grade creep" 31/ had affected ALJ salaries. The support for this assertion was a comparison of applicable grades in 1946 and 1983 which ignored the fact that bar membership was not required of candidates until 1964.

OPM has also so far ignored the recommendations of a fact-finding study group sponsored by its predecessor. This study group began work in 1973 and became known as the "La Macchia Committee" for its chairman, the Civil Service Commission's Deputy General Counsel, Philip La Macchia. It reviewed current literature, case law and government statistics. Personal interviews were conducted with every chief administrative law judge, representatives of every federal agency where administrative law judges were employed, and numerous government and private attorneys who customarily practiced before the judges. In addition, questionnaires were sent to the 800 administrative law judges then employed by federal agencies, to all of the agencies where they were employed, to 700 government attorneys, and to 150 attorneys in private practice. Specific responsibility for developing facts and conclusions on various aspects of administrative law judge employments was divided among nine subcommittees. Two special subcommittees were assigned to study the ability of administrative law judges to preside over cases for more than one agency without compromising their expertise. Both subcommittees dismissed the compromise of expertise as a problem, and suggested that the establishment of a unified corps had greater merit and was more feasible than a voluntary loan program. 32/ The Committee wholeheartedly endorsed the Corps concept. 33/

As envisioned by the Committee, the Corps would preserve expertise and meet stated agency objections by being organized into specialized divisions. The Committee's recommendation for a Corps was overwhelmingly supported by administrative law judges. The Committee's collected statistics showed that sixty-nine percent of the administrative law judges who completed the written questionnaire favored a self-administered corps and only eight and one half percent were opposed to its creation. 34/

Another finding by the La Macchia Committee concerned agency practices in reviewing administrative law judge decisions. It found that the resolution of cases were often being substantially prolonged without the substance of the ALJ's decision being materially altered. The Committee recommended the adoption of rules to make administrative law judge decisions final, subject only to discretionary agency review.

In testimony before the Senate Judiciary Committee on the need for an Administrative Law Judge Corps, Professor Victor G. Rosenblum assessed the strength of the Office of Personnel Management's commitment to the improvement of the administrative law judge program subsequent to the La Macchia study. 35/ Professor Rosenblum testified that the various suggestions of the Committee have "lapsed into limbo" and that OPM has demonstrated "truncated enthusiasm" for its Office of Administrative Law Judges. 36/ He cited a GAO study which resulted in the release of two reports. 37/ The reports made it very clear that both the Civil Service Commission, now OPM, and the agencies, failed to heed the recommendation of the La Macchia Committee to curtail inordinate review of the judges' decisions: 38/

> "Although the Administrative Procedure Act was enacted to resolve conflicts promptly and fairly, timely decisions are not being made because the process is burdened with extensive reviews. . . .
>
> . . . . . .
>
> "While agencies have the authority to review Administrative Law Judges' decisions, the process is burdened unnecessarily with multiple layers and numerous agency personnel. This increases the time required to reach a final decision by hundreds of days and the cost by millions of dollars.
>
> . . . . . .
>
> "These multilayer review processes also raise doubts that the Act's goals -- making Administrative Law Judges an important factor in the decision process and assuring that agency views are not being unduly emphasized or secretly submitted -- are being achieved."

The GAO investigators were also troubled by inadequate management of ALJ functions; the failure of CSC to maintain and use information showing administrative law judge productivity to evaluate agency requests for additional judges; and its pro forma approval of agency requests to use selective certification for choosing new judges. 39/ In the closing chapter of its first report, the GAO restated its concerns and concluded: 40/

> "These criticisms are not new. For the past 30 years, committees, studies, and advisory groups have said substantially the same things. Yet, little has been done by the Congress, employing agencies, or CSC to significantly improve the situation."

A year after circulation of its first report, GAO issued a second report, summarizing its prior recommendations and evaluating the responses. 41/ This report concluded that the recommendations by GAO had been largely ignored and that all who had received copies of the first report were doing "little to improve the administrative law process." 42/

V. The Corps is Needed to Instill Public Confidence

The establishment of a unified corps of administrative law judges is essential to instill confidence in the fairness of the administrative process.

We have given two principal examples of cases heard by administrative law judges which require them to be separate and apart from their present employing agencies. But every member of the administrative judiciary requires this protective insulation. Proper and efficient administration of the functions and employment of all judges holding their appointments pursuant to Article I of the Constitution, requires that they all be part of a single body having rationally defined divisions where the expertise possessed by each judge may be put to the fullest use.

It perhaps bears brief emphasis here that, as a nation, we have come to increasingly rely upon the substance and procedures of administrative law. As stated by Justice Jackson:

> "The rise of administrative bodies probably has been the most significant legal trend of the last century and perhaps more values today are affected by their decisions than by those of all the courts, review of administrative decisions apart."

The 1969 report of the Ash Council is a useful starting point for congressional staff members to begin their review of the widely acknowledged problems of the present-day administrative process; it summarized the first two decades under the Administrative Procedure Act of 1946 and contains a detailed bibliography of the early, pertinent literature. 43/ Recent articles by members of the academic community emphasize the need to guarantee fair administrative hearings through the separation of administrative law judges from Executive Departments and agencies. 44/

Various states have taken this step and have already established the equivalent of the proposed Corps. 45/

The federal administrative process will be vastly strengthened by a centrally managed corps of administrative law judges. The "Corps approach" is a natural progression in the continuing evolution of the art and science of administrative law. More importantly, this change will go far to correct longstanding deficiencies in the administrative process. It will prevent the exercise of supervisory dominion over administrative law judges by agencies which are tempted to manipulate the adjudicative process to attain what are perceived to be politically desirable goals. Each agency now chooses who will be its Chief Judge and may choose a pliant person who will readily accede to agency desires rather than act as a bulwark against injustice. Then, too, agencies have very real control over the assignment of their cases, and true mechanical rotation is neither required nor observed. Opportunities for routing an important case to an ALJ whose known predilections favor the agency position definitely do exist. The agency's control over the office space; secretarial and clerical services allocated to each judge; the promptness with which reimbursements are made to a judge for his or her expenses of travelling to a hearing; these are but a few examples of the many ways an agency controls a judge's work and working conditions. Each has given rise to allegations of improper carrot/stick pressuring of administrative law judges. 46/

The basic need for an independent Corps stems from the fundamentally independent, judicial nature of the administrative law judge function. The same independence of function was recognized in another context years ago, when the administration of the federal court system was removed from the Department of Justice.

It cannot be overemphasized that the proper function of the administrative law judge is not, and should not be, that of a policymaker or a team player. The function should not be obfuscated by labeling it as "quasi-judicial." The essence of this function in modern day administrative adjudication is that of a judge; nothing more and nothing less. Impartial factfinding which requires the application of laws, court interpretations, and articulated congressional and agency policy is a judicial function. The independence essential to the function should be guaranteed by the physical and administrative separation needed to ensure and demonstrate the integrity of the administrative process.

Agencies may assert that the administrative judiciary should not be independent because the administrative process as a whole is an agency matter. This position, however, ignores the fact that administrative law judges are -- plainly and simply -- judging controversies to which the agency in most instances is a party. Thus, if due process is to be achieved, the rulings and decisions by administrative law judges while, of course, subject to agency and court review on-the-record, must be independent of outside-the-record influence or control by the agency.

Indeed, unless overwhelming economic savings were to be demonstrated favoring the status quo, which is not the case, it would appear that no argument exists for the present system of agency housing of administrative law judges. The principal result of maintaining such a system is the perpetuation of agency potential to influence the judges by outside-the-record considerations. Since, however, the economic balance of costs would plainly favor central housing and administration of the administrative judiciary, a fair -- and vital -- question must be raised as to why the existing system is not changed to ensure the independence of the function of the administrative law judge.

The organization of administrative law judges as a single Corps whose services are available to all administrative agencies for the conduct of hearings under the APA is a logical step in the evolution of the administrative law process and one which has many attendant benefits in terms of cost savings, efficient employment of judges, and the strengthening of integrity and the effectiveness of government programs.

The funding of all administrative law judge functions through one organization would create major savings of resources while giving the Congress, the provider of these resources, a far greater assurance that the administrative law judges are fully and properly employed and that the program results of their actions will be in a form susceptible to effective Congressional oversight, review by the courts and evaluation by the public.

At present, each agency has its own judges even though the judges are qualified to provide judicial services for other agencies. 47/ Under elaborate procedures for the selection and qualification of administrative law judges, the Office of Personnel Management develops an official list, or register, of judicial applicants eligible for selection by the agencies. Since the requirements for placement on the register are principally the same for all agencies, 48/ it is clear that the administrative law judges are all basically qualified to serve any agency. The benefits of their expertise and familiarity with the work of certain agencies can be effectively preserved by assigning them to appropriate divisions within the Corps. We believe that the structure proposed by the various bills before Congress and S. 950 in particular, will both preserve expertise while protecting necessary judicial independence.

VI. The States Provide Precedents

A unified corps of federal administrative law judges finds precedent in state governments. 49/

In Maine, an Administrative Court has been established having jurisdiction over licensing cases. The licensing agency appears as a party before the Maine Administrative Court and its decisions are subject to review only by a higher court.

Eleven other States have established central panel systems, namely: California, Colorado, Florida, Massachusetts, Minnesota, Missouri, New Jersey, Tennessee, Washington, North Carolina, and Wisconsin. Under the central panel system, administrative law judges are assigned to a single, central panel that provides trial services to various agencies as needed. Substantial cost savings and efficiencies have been achieved in each of these States and compelling statistical evidence has been compiled and published by the States of Minnesota and New Jersey. More importantly, each State has witnessed improved public perception of administrative law judges as members of a truly independent administrative judiciary.

The central panel system is incorporated as part of the Model State Administrative Procedure Act, as revised in 1981, and a growing number of States are now actively considering its adoption. During the past two years, the following 16 States have either made a proposal to their legislatures to establish a central panel system, or are in the process of studying the concept: Alaska, Arizona, Georgia, Illinois, Indiana, Maryland, Michigan, Nebraska, New York, North Dakota, Ohio, Oregon, Pennsylvania, South Dakota, Virginia and Wyoming.

VII. Conclusion

We believe the previous discussion demonstrates compelling reasons and persuasive precedents for the establishment of a unified corps of federal administrative law judges. The chief advantages of an ALJ Corps as envisioned by the bill may be summarized as follows:

1. Improved public perception of the fairness of the administrative process. This would be achieved through full compliance with the requirement that those conducting adjudications must be truly independent and free from any association or personal obligation to any party, in order that every party be afforded due process.

2. Significant cost savings.

3. More efficient and flexible use of the administrative law judges presently employed by 29 separate agencies and departments.

4. Establishment of a Complaints Resolution Board to better assure that administrative law judges are held accountable for their actions and conduct.

5. Preservation of the merit selection system.

6. Retention and enhancement of the expertise possessed by administrative law judges.

7. Increased and better identified availability of administrative law judges to assist all agencies and federal courts upon specific request.

VIII. Footnotes

1. See Attachments A and B. Attachment A was prepared by the Office of Administrative Law Judges, Office of Personnel Management, showing, as of January 27, 1986, the distribution of administrative law judges by grade and agency. Attachment B is a

table originally compiled by Jeffrey S. Lubbers, Research Director, Administrative Conference of the United States (ACUS), which was published in 65 Judicature 268 (1981), to which the current data for January 1986 has been added.

2. See, e.g., "The Pole of the Administrative Law Judge in the Title II Social Security Disability Insurance Program," a report of October 1983, by the Subcommittee on Oversight of Government Managment of the Committee on Governmental Affairs of the United States Senate. S.Prt. 98-111, 98th Cong., 1st Sess. Based on the hearing the Subcommittee conducted on this issue, its Chairman, Senator William S. Cohen and Ranking Minority Member, Senator Carl Levin, reported: "The Subcommittee's principal finding is that the SSA is pressuring its ALJs to reduce the rate at which they allow disabled persons to participate in or continue to participate in the Social Security disability program. (The SSA has been successful in its efforts as evidenced by recent statistics showing a dramatic decline in the administrative law judge allowance rate in the past year and a half from 67.2 percent in mid-1982, to 51.9 percent in June 1983). The Subcommittee also finds that the SSA is imposing this pressure through several means including the inequitable and unjustified targeting of only allowance decisions and high allowance judges for review pursuant to an amendment sponsored by Senator Henry Bellmon and passed in 1980 (Bellmon Review), and the use of minimum production quotas and productivity goals." Id. at III.

3. Gulan v. Heckler, 583 F.Supp. 1010, 1017-18 (N.D. Ill. 1984, in which the District Court stated: "The ALJ's performance falls far short of the level of objective and fair justice that judges in the United States are expected to achieve. The reasons for these apparently frequent unjudicial performances by HEW Administrative Law Judges are not clear although there have been suggestions that they are the result of pressures brought to bear on them by executives in the department for political and fiscal reasons. If this is the case, it should stop. There is no room in our system of justice for Nazi or Soviet-type misuse and abuse of judges and no ALJ should be exposed or succumb to such pressure."

4. See Levant, "Unified Corps of Administrative Law Judges - The Transition From a Concept to An Eventual Reality," 6 W.New Eng.L.Rev. 705, 717-714, (1984) and Palmer and Bernstein, "Establishing Federal Administrative Law Judges as an Independent Corps: The Heflin Bill," 6 W.New Eng.L.Rev. 673, 693-698 (1984). See also, testimony, on May 13, 1986, before the Subcommittee on Administrative Practice and Procedure of the Senate Judiciary Committee.

5. See Comptroller General's Report to the Congress, "Administrative Process: Better Management Is Needed," FPCD-78-25 (May 15, 1978) (GAO Report 1978); Comptroller General's Report to the Congress, "Management Improvements In The Administrative Law Process: Much Remains to be Done," FPCD-79-44 (May 23, 1979) (GAO Report 1979). The reports were responsive to a request by Congressman John Moss for a study by the General Accounting Office pursuant to its authority under the Budget and Accounting Act of 1921, 31 U.S.C §§ 712, 718, 719 (1982) (amending 33 U.S.C. § 53 (1976)) and the Legislature Reorganization Act of 1970, Pub. L. No. 91-510, 84 Stat. 1140 (1970).

6. See, discussion under the heading, "The States Provide Precedent", infra, at 27.

7. See Report of the State of New Jersey Governor's Committee on the Office of Administrative Law (1984), at page 8. See also, "A Report on The First Decade: 1975-1985" by the Office of Administrative Hearings, the State of Minnesota (Jan. 1986).

8. Memorandum of November 6, 1984, by Jeffrey Lubbers, Research Director, ACUS, on Meeting of State ALJ Central Panel Directors.

9. American Bar Association Journal, November 1976, Volume 62, pp. 1425-1428, at 1426.

10. See Scalia, "The Hearing Examiners Loan Program," 1971 Duke L.J. 319, 360 (1971) in which Judge Scalia concludes that a corps of ALJs is needed for loan purposes because "the only means of assuring an adequate supply of examiners (ALJs) for loan work is to employ examiners (ALJs) for that very purpose."

11. See Attachment "B".

12. L. Jaffe, "Judicial Control of Administrative Actions" at 114 (1965).

13. 1 C.F.R. § 305.72-6.

14. Ibid.

15. Ibid.

16. Ibid. See 5 U.S.C. §§ 551-559; 701-706.

17. Atlas Roofing Co. v. Occupational Safety Commission, 430 U.S. 442.

18. 1 C.F.R. § 8305.79-3. Acceptance of the 1972 ACUS recommendation is exemplified by the 1982 enactment of H.R. 6679; empowering the Secretary of Agriculture to administratively assess civil penalties "after notice and opportunity for an agency hearing on the record" in enforcement of nine separate statutes controlling the introduction of plant, livestock and poultry diseases to the United States. And see Final Report to ACUS, May 1979, "The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies" by Professor Colin S. Diver, Boston University School of Law, which reported that by 1979, there were 348 statutory civil penalties, of which 141 were directly assessed by federal Departments and agencies. (An abridged version was published in 79 Columbia L.Rev. 1435 (1979)).

19. For a discussion on the proper limits of agency discretion, see Wright, Beyond Discretionary Justice, 81 Yale L.J. 575, 590-591 (1972).

20. See Attachment B.

21. All of the statistics pertaining to HHS are taken from its published Operational Reports.

22. See Stieberger, et al. v. Heckler, _____ F.Supp. _____, (D.C. S.D. N.Y.) 84 CIV 1302, 8-19-85, reported in CCH "Unemployment Insurance Reports," pp. 2399-79 through 2454 (1985 edition). See also the Subcommittee report cited in footnote 2, supra.

23. This form of review become known as "Bellmon Review," since it was purportedly responsive to a direction by Congressman Bellmon.

24. See Cofer, "Judges, Bureaucrats, and the Question of Independence: A Study of the Social Security Administration Hearing Process," Greenwood Press. Professor Cofer conducted a comprehensive survey of the ALJs at SSA in which 70% of those who responded to her questionnaire affirmed that: "Tacit agency pressure is placed upon SSA ALJs to hand down fewer 'reversals' during times of national governmental economic retrenchment."

25. Association of Administrative Law Judges, Inc. v. Margaret M. Heckler, et al. 594 F.Supp. 1132 (D.D.C. 1984).

26. Id. at 1142.

27. Id. at 1143.

28. Price, "The Question of Independence Continues: Administrative Law Judges Within the Social Security Administration," 64 Judicature 228, at 233 (Dec. - Jan. 1986). See also Stieberger, supra, footnote 21.

29. Id. at 233.

30. OPM employed this phrase in its memorandum of February 9, 1983, which it circulated among Chief ALJs and agency heads.

31. Morse, "The Administrative Law Judge - A New Direction For The Corps?" 30 Fed. Bar News & Journal, 398, 399 (1983).

32. As to the limitations on voluntary loan programs and the need for a corps of unattached judges to conduct hearings for multiple agencies, see the Duke Law Review article by Scalia, supra, footnote 9.

33. United States Civil Service Commission: Report of the Committee on the Study of the Utilization of Administrative Law Judges, at 66-67, July 30, 1974.

34. Id. at 45, 63.

35. Administrative Law Judge Corps Act: Hearings on S. 1275 Before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 94th Cong., 1st Sess. 264 (1983).

36. Id.

37. See reports cited in footnote 5, supra.

38. Id. GAO Report 1978, at Digest ii-iii.

39. Id. at iiv and v.

40. Id. at 44.

41. Id. GAO Report 1979, at 1-3.

42. Id.

43. "A New Regulatory Framework, Report on Selected Independent Regulatory Agencies," by the President's Advisory Council on Executive Organization, January 1971.

44. Levinson, The central panel system: a framework that separates ALJs from administrative agencies, 65 Judicature 236 (1981); Lubbers, Federal Administrative Law Judges: a Focus on Our Invisible Judicary, 33 Ad.L.Rev. 109 (1981); Lubbers, A unified corps of ALJs: a proposal to test the idea at the federal level, 65 Judicature 266 (1981); Marquardt and Wheat; The Developing Concept of an Administrative Court, 33 Ad.L.Rev. 301 (1981); Levinson, The Proposed Administrative Law Judge Corps: An Incomplete But Important Reform Effort, 19 New Eng.L.Rev. 733 (1984); Kauper, Protecting the Independence of Administrative Law Judges: A Model Administrative Law Judge Corps Statute, 18 U. of Mich. J. of Law Ref. 537 (1985). See also the articles cited in footnote 4, infra, and the two articles that are attached.

45. See the discussion under the heading "The States Provide Precedents", infra, at 27.

46. See footnote 4, supra.

47. See Attachment "C", an SSA memorandum, which lists the wide variety of cases to which ALJs at SSA have been detailed on voluntary loan programs from October 15, 1983 through June 28, 1985.

48. Excepting the "selective" register which has fallen into disuse by most agencies and which we believe should be abolished

to attract the best candidates from the ranks of private practice as well as government service.

49. *See* the November 1981 edition of Judicature, "The Central Panel System: A New Framework for the Use of Administrative Law Judges; and, in particular, *Levinson*, *The Central Panel System: A Framework that Separates Administrative Law Judges from Administrative Agencies*, 65 Judicature 236. *See also* Rich and Brucar, "The Central Panel System for Administrative Law Judges: A Survey of Seven States" (Frederick, Md., University Publications of America, 1983), and the report by the State of New Jersey Governor's Committee, *supra*, footnote 6.

ESTABLISHING FEDERAL ADMINISTRATIVE LAW JUDGES AS AN INDEPENDENT CORPS: THE HEFLIN BILL

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ESTABLISHING FEDERAL ADMINISTRATIVE LAW JUDGES AS AN INDEPENDENT CORPS: THE HEFLIN BILL

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I. INTRODUCTION

At the annual banquet of the Federal Administrative Law Judges Conference on May 14, 1983, Senator Howell Heflin announced that two days earlier he had introduced a bill to establish administrative law judges as an independent, unified corps. The Senator discussed the importance of the administrative judiciary and the need for its functions to be performed in an independent atmosphere, free of bias, in order to assure fairness and give credence to its decisions. Senator Heflin stressed that "these judicial officers must be free from any association or personal obligation to any party or agency in order that every litigant to the process be afforded fairness and due process. The mere appearance of bias and prejudice smacks at the vital concept of fairness and due process."[1]

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[1] Address of Senator Heflin, Federal Administrative Law Judges Conference Annual Banquet in Washington, D.C. (May 14, 1983). *See also* 129 CONG. REC. S6610-11 (daily ed. May 12, 1983) (statement of Sen. Heflin). "Agency" as used by Senator Heflin

Senator Heflin noted that the use of similar systems in several States had resulted in substantial savings and efficiencies that he expected the federal government would experience once his bill, Senate bill 1275[2] was enacted.[3]

This article will describe the status of administrative law judges in the federal government; analyze Senate bill 1275; review the testimony before the Subcommittee on Administrative Practice and Procedure, Senate Judiciary Committee; and evaluate the arguments in support of and in opposition to Senator Heflin's bill.

II. THE PRESENT STATUS OF FEDERAL ADMINISTRATIVE LAW JUDGES

There are 1,134 administrative law judges serving in the federal government today.[4] They hear and decide cases that "permeate every sphere and almost every activity of our national life [and] have a profound effect upon the direction of our economic growth."[5]

Professor Kenneth Culp Davis estimates that the use of administrative judges began in 1789 with the appointment of officers to determine which soldiers were "disabled during the late war" and customs officers who were authorized to "estimate the duties payable" on imports.[6]

But 1946 is the true year of birth for today's federal administrative law judge. That is the year the Administrative Procedure Act (APA) was enacted.[7]

Under the APA, administrative law judges presently hold career appointments pursuant to a system of merit selection.[8] They are the only government officers, apart from certain agency heads or officials who are provided for specially under other specific statutes, who may conduct rulemaking and adjudicative hearings when agency ac-

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and by the authors, includes executive departments. This is consistent with the definition of "agency" in the Administrative Procedure Act. 5 U.S.C. § 551(1) (1982).

[2] S. 1275, 98th Cong., 1st Sess. (1983).

[3] 129 CONG. REC. S6610 (daily ed. May 12, 1983) (statement of Sen. Heflin).

[4] OFFICE OF PERSONNEL MANAGEMENT, TOTAL NUMBER OF ALJS ON BOARD BY GRADE AND AGENCY AS OF NOVEMBER 21, 1983.

[5] Message of President John F. Kennedy, H.R. DOC. No. 135, 57th Cong., 1st Sess. 1-2 (1961), *quoted in* Macy, *The APA and the Hearing Examiner: Products of a Viable Political Society*, 27 FED. B.J. 351, 353 (1967).

[6] 3 K.C. DAVIS, ADMINISTRATIVE LAW TREATISE § 17.11, at 313 (2d ed. 1978).

[7] Administrative Procedure Act of 1946, ch. 324, 60 Stat. 237 (current version at 5 U.S.C. §§ 551-559, 701-706, 1305, 3105, 3344, 6362, 7562 (1982)).

[8] ADMINISTRATIVE CONFERENCE OF THE U. S., FEDERAL ADMINISTRATIVE LAW JUDGE HEARINGS STATUS REPORT FOR 1976-1978, at 9-13 (1980).

tion is based on substantial evidence of record. Their functions have been held to be "functionally comparable"[9] to those of trial judges which entitles them to absolute immunity from liability arising out of their judicial acts.[10]

The APA was enacted in response to charges that "the practice of creating independent regulatory commissions, who perform administrative work in addition to judicial work, threatens to develop a 'fourth branch' of the Government for which there is no sanction in the Constitution."[11]

The change in the status of administrative law judges[12] effectuated by the APA, was first reviewed by the Supreme Court in *Ramspeck v. Federal Trial Examiners Conference*.[13] In that case the Supreme Court traced the history of these Article I officers and the

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[9] Butz v. Economou, 438 U.S. 478, 513 (1978).

[10] *Id.* at 516.

[11] S. Doc. No. 248, 79th Cong., 2d Sess. (1937), *reprinted in* Legislative History of the Administrative Procedure Act of 1946, at 189 (1946).

[12] In 1978, the APA was amended to substitute the title "Administrative Law Judge" for the earlier designation "Hearing Examiner." Act of March 27, 1978, Pub. L. No. 95-251, §§ 2, 3, 92 Stat. 183, 183-84.

[13] 345 U.S. 128 (1953).

> Prior to the passage of the Administrative Procedure Act, hearing examiners' tenure and status were governed by the Classification Act of 1923, as amended. Under the Classification Act, as employees of an agency, their classification was determined by the ratings given them by the agency, and their compensation and promotion depended upon their classification. The examiners were in a dependent status.
>
> With the rapid growth of administrative law [their] role. . .became increasingly significant and controversial. . . .
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> Many complaints were voiced against the actions of the hearing examiners, it being charged that they were mere tools of the agency concerned and subservient to the agency heads in making their proposed findings of fact and recommendations. A study by President Roosevelt's Committee on Administrative Management resulted in a report in 1937 recommending separation of adjudicatory functions and personnel from investigative and prosecution personnel in the agencies. The Attorney General's Committee on Administrative Procedure was appointed in 1939 to study the decisional process in administrative agencies, and the final report of this Committee was published in 1941. Both the majority and minority members of the Committee recommended that hearing examiners be made partially independent of the agency by which they were employed; the majority recommended hearing examiners be appointed for a term of seven years and the minority recommended a term of twelve years. Although extensive hearings were held on bills to carry out the recommendations of this Committee, World War II delayed final congressional action on this subject. After the war, the McCarron-Sumners Bill, which became the Administrative Procedure Act, was introduced. The Senate Judiciary Print of June 1945 reveals that at that time there was still great diversity of opinion as to how the status of hearing examiners should be enhanced. Several proposals were considered, and in the final bill Congress provided that hearing examiners

controversial nature of their positions. The APA's legislative history demonstrates that there had been much stronger support for the creation of a fully, independent administrative judiciary than that indicated by the majority opinion in *Ramspeck*.[14] The final report of the Attorney General's Committee, for example, contains an express recommendation by the minority members for complete separation of the adjudicative function in cases involving agency prosecution of complaints against private parties:

> Hearing and deciding officers cannot be wholly independent so long as their appointments, assignments, personnel records, and reputations are subject to control by an authority which is also engaged in investigating and prosecuting. Of course, this dependence may be diminished by various devices, as the Committee has very rightly attempted. We think it clear, however, that such dependents (sic) cannot be eliminated by measures short of complete segregation into independent agencies.[15]

Concern over administrative impartiality antedating the 1946 enactment of the APA had led to earlier congressional responses. In 1939, Senator Norris introduced a bill to create a separate administrative court.[16] A succession of bills offering various remedies were introduced in Congress between 1933 and 1946;[17] and, during the interim between the appointment of the Attorney General's Committee pursuant to the directions of President Roosevelt, and the issuance of its formal report, Congress actually passed one of them—the Walter-Logan bill.[18] It was vetoed by President Roosevelt on December 18, 1940, and the veto was sustained by the House. When this event was later discussed by Justice Jackson in *Wong Yang Sung v. McGrath*,[19] however, he concluded that though the President vetoed the bill, he recognized the need for reform.[20] Justice Jackson

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> should be given independence and tenure within the existing Civil Service system.

Id. at 130-32.

[14] S. Doc. No. 248, 79th Cong., 2d Sess. (1937), *reprinted in* LEGISLATIVE HISTORY OF THE ADMINISTRATIVE PROCEDURE ACT OF 1946, at 41-42 (1946).

[15] ATT'Y GENERAL'S COMM. ON ADMINISTRATIVE PROCEDURE, ADMINISTRATIVE PROCEDURE IN GOV'T AGENCIES, S. Doc. No. 8, 77th Cong., 1st Sess. 203-09 (1941).

[16] S. 5154, 70th Cong., 2d Sess. (1939).

[17] S. 1835, 73d Cong., 1st Sess. (1933); S. 3787, H.R. 1297, 74th Cong., 2d Sess. (1936); S. 3676, 75th Cong., 3d Sess. (1938); H.R. 6324, H.R. 4235, H.R. 4236, S. 915, S. 916, 76th Cong., 1st Sess. (1939); S. 674, S. 675, S. 918, H.R. 3464, H.R. 4238, H.R. 4782, 77th Cong., 1st Sess. (1941); H.R. 1203, S. 7, 79th Cong., 1st Sess. (1945).

[18] S. 915, H.R. 6324, 76th Cong., 1st Sess. (1939).

[19] 339 U.S. 33 (1950).

[20] *Id*. at 39.

said of the APA itself: "The Act thus represents a long period of study and strife; it settles long-continued and hard-fought contentions, and enacts a formula upon which opposing social and political forces have come to rest. It contains many compromises and generalities and, no doubt, some ambiguities. Experience may reveal defects. . . ."[21]

The alternatives before Congress and the methodology selected to secure the independence of the administrative judiciary is described in the legislative history of the APA, as follows:

> The purpose of this section is to render examiners independent and secure in their tenure and compensation. The section (section 11 of the APA) thus takes a different ground than the present situation in which examiners are mere employees of an agency, and other proposals for a completely separate "examiners' pool" from which agencies might draw for hearing officers. Recognizing that the entire tradition of the Civil Service is directed toward security of tenure, it seems wise to put that tradition to use in the present case. However, additional powers are conferred upon the Commission.[22]

When the Supreme Court, in *Butz v. Economou*[23] held administrative law judges to be "functionally comparable" to trial judges, it stressed that they resolve conflicts of an adversarial nature "every bit as fractious as those which come to court," and have comparable powers to issue subpoenas, rule on proffers of evidence, regulate the course of hearings, and make or recommend decisions.[24] The opinion went on to list the APA's provisions designed to guarantee the independence of administrative law judges: The Office of Personnel Management and the appointing agency-employer controls their pay; cases must be assigned to them in rotation so far as practicable; no party may consult with them *ex parte* concerning a fact at issue in a hearing; they may not be responsible to, supervised by, or directed by agency agents or personnel performing investigative or prosecution functions; they may not perform duties inconsistent with their duties as administrative law judges; and they may be removed only for good cause established and determined by the Merit System Protection Board after a hearing on the record.[25]

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[21] *Id.* at 40-41.

> Of the several administrative evils sought to be cured or minimized, only two are particularly relevant to issues before us today. One purpose was to introduce greater uniformity of procedure and standardization of administrative practice among the diverse agencies whose customs had departed widely from each other. . . .
>
> More fundamental, however, was the purpose to curtail and change the practice of embodying in one person or agency the duties of prosecutor and judge.

Id.

[22] S. Doc. No. 248, 79th Cong. 2d Sess. (1937), *reprinted in* LEGISLATIVE HISTORY OF THE ADMINISTRATIVE PROCEDURE ACT OF 1946, at 215 (1946).

[23] 438 U.S. 478 (1978).

[24] *Id.* at 512-13.

But the insulation from agency pressures that the APA affords administrative law judges is far from complete. The Supreme Court in its earlier decision in *Ramspeck*, upheld the right of the Civil Service Commission[26] to classify " the examiners into grades, with salaries appropriate to each grade, . . . in each federal agency using examiners. This classification ranged from just one grade in several agencies to five grades in two agencies."[27] The majority conceded that the Commission had employed wholly subjective specifications when it classified the grades as "moderately difficult and important," "difficult and important," "unusually difficult and important," "exceedingly difficult and important," and "exceptionally difficult and important."[28] Nevertheless, the majority upheld this practice under which the employing "agency shall decide if there is a vacancy to be filled, and further that the agency shall decide if this vacancy is to be filled by promotion from among the present examiners."[29]

The majority opinion next interpreted the APA's requirement that "examiners shall be assigned to cases in rotation *so far as practicable*."[30] The majority believed that this did not require *mechanical* rotation, but permitted assignments to be made on the basis of "the experience and ability of the examiner available."[31]

Finally, the majority held that an agency may dispense with the services of administrative law judges "for lack of funds, personnel ceilings, reorganizations, decrease of work and similar reasons" through "reductions-in-force," under which judges holding the lowest number of "retention credits" may be removed from office "for good cause" within the meaning of the APA.[32]

Justice Black, with whom Justices Frankfurter and Douglas concurred, vigorously disagreed with the *Ramspeck* majority opinion:

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[25] *Id.*; *see also* 5 U.S.C. §§ 554(d), 3105, 7521 (1982).

[26] The Civil Service Commission was the predecessor of the Office of Personnel Management and the Merit Systems Protection board.

[27] *Ramspeck*, 345 U.S. at 135.

[28] *Id.* at 136-37.

[29] *Id.* at 138.

[30] *Id.* at 139 (emphasis in original).

[31] *Id.* at 139-40.

[32] *Id.* at 142-43.

> I agree with the District Court and the Court of Appeals that the regulations here sustained go a long way toward frustrating the purposes of Congress to give examiners independence. . . . The distinctions depended upon to support the different classifications are so nebulous that the head of an agency is left practically free to select any examiner he chooses for any case he chooses. . . . And administrative agencies are permitted to attribute choice of a particular examiner for a particular case to considerations whether "complex legal, economic, financial or technical questions or matters" are merely "moderately complex," "fairly complex," "extremely complex," "exceptionally complex," or just "complex." I think all these conceptualistic distinctions mean is that the congressional command for a nonagency controlled rotation of cases is buried under words.[33]

But, the *Ramspeck* majority is still the controlling interpretation of the actual parameters of protection from agency pressures that the APA provides to administrative law judges. Those who argue that the APA's protections are so all-embracing that there is no need to completely separate administrative law judges from their present agency employers, necessarily ignore *Ramspeck*. They ignore concerns embodied in calls for the establishment of an administrative court by the recommendations of the Second Hoover Commission in 1955,[34] the Ash Council in 1971,[35] and then Solicitor General Robert H. Bork in 1977.[36] They also overlook the 1974 report of the La Macchia Committee which stopped short of recommending anew the formation of an administrative court and opted instead for the establishment of a "unified corps."[37]

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[33] *Id*. at 144-45 (Black, J., dissenting) (footnotes omitted).

[34] Comm'n on Organization of the Executive Branch of the Government, 84th Cong., 1st Sess., Report to the Congress Vol. VI, at 84 (1955). The recommended court would have consisted of three sections: Tax (which would involve transferring this function from the Executive to the Judicial Branch); Labor (replacing the NLRB); and Trade (replacing the FTC and certain other regulatory agencies). Hearing Examiners would have been replaced by Hearing Commissioners serving as the Court's trial division. *Id*.

[35] PRESIDENT'S ADVISORY COUNCIL ON EXECUTIVE ORGANIZATION, A NEW REGULATORY FRAMEWORK 53 (1971). This proposed an administrative court having jurisdiction over appeals from transportation, securities, and power agencies. *Id*.

[36] DEP'T OF JUSTICE COMM. ON REVISION OF THE FEDERAL JUDICIAL SYSTEM, THE NEEDS OF THE FEDERAL COURTS (1977). The Bork Committee proposed that non-Article III tribunals be created which "could consist of an Article I trial division. . .and an administrative court of appeals. The trial division could serve the function now served by administrative law judges. . . ." *Id*. at 7-11.

[37] UNITED STATES CIVIL SERVICE COMM'N, REPORT OF THE COMM. ON THE

It is this latter recommendation which the Heflin Bill would implement.

III. THE HEFLIN BILL: ITS PURPOSE AND PROVISIONS

The essential purpose of the Heflin bill is to remove administrative law judges from the supervision and control of the agencies where they are presently employed, and establish them instead, as an independent, unified corps.[38]

The Corps would initially be divided into seven divisions in keeping with present, major specialties of administrative law.[39] Each division would be headed by a division chief judge required by the bill to be an expert in the division's field of adjudication, demonstrated by having at least five years of experience as an administrative law judge assigned to cases of the type to be handled by the division.[40] The division chiefs, together with the chief judge of the

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STUDY OF THE UTILIZATION OF ADMINISTRATIVE LAW JUDGES (LAMACCHIA COMM'N REPORT) 46 (1974).

[38] 129 CONG. REC. S6609-10 (daily ed. May 12, 1983) (statement of Sen. Heflin).

[39] S. 1275, 98th Cong. 1st Sess. § 2 (1983) (proposing codification at 5 U.S.C. § 564(b)). These divisions would be organized in the following manner:

1. *Division of Communication, Public Utility and Transportation Regulation*
Federal Communications Commission, Federal Energy Regulatory Commission, Interstate Commerce Commission, Civil Aeronautics Board, Federal Maritime Commission, Nuclear Regulatory Commission.

2. *Division of Health, Safety and Environmental Regulation*
Occupational Safety and Health Review Commission, Federal Mine Safety and Health Review Commission, National Transportation Safety Board, Environmental Protection Agency, Department of the Interior, National Oceanic and Atmospheric Administration, Coast Guard.

3. *Division of Labor Relations*
National Labor Relations Board, Federal Labor Relations Authority.

4. *Division of Benefits Program* & Health)
Social Security Administration.

5. *Division of Securities, Commodities and Trade Regulation*
Department of Agriculture, Commodity Futures Trading Commission, Securities and Exchange Commission, Federal Trade Commission, International Trade Commission.

6. *Division of Labor*
Department of Labor.

7. *Division of General Programs*
Drug Enforcement Administration, Department of Housing and Urban Development, Food and Drug Administration, Bureau of Alcohol, Tobacco and Firearms, Maritime Commission, U.S. Postal Service, Merit Systems Protection Board.

[40] *Id*. (proposing codification at 5 U.S.C. § 564(c)).

Corps, would govern the Corps' affairs and operations as a collegial council.[41]

Administrative law judges are presently examined by the Office of Personnel Management (OPM) which certifies the top three candidates to individual agencies for appointment to available positions as employees of those agencies.[42] The bill would preserve the present system of merit selection through OPM-administered examination of candidates.[43] It would serve to enlarge the list of eligibles from the best three to the best five candidates for each vacancy. This would increase opportunities for women and ethnic minority candidates who are less likely to be entitled to veteran's preference.[44] Existing administrative law judges would be transferred to the Corps upon the commencement of its operation and each would be assigned to a division after consideration of the areas of specialization in which the judge had served.[45] The judges would be paid uniform salaries,[46] though slightly higher salaries would be provided for the chief judge and the division chiefs.

Additionally, the bill would screen applicants for the chief judge of the Corps and the division chief judge positions by creating a five-person Judicial Nomination Commission.[47] The Commission would determine, for each vacancy, the three best qualified applicants, who had been administrative law judges for at least five years, and forward those names to the President for his appointment by and with the advice and consent of the Senate. The bill also recognizes the Presidential power to reject any list of names designated for any one position, and to request the Commission to submit another.[48]

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[41] *Id*. (proposing codification at 5 U.S.C. § 565(a)).

[42] *See* 5 U.S.C. §§ 3301, 3304, 3305 (1982).

[43] *See* S. 1275, 98th Cong., 1st Sess. § 2 (1983) (proposing codification at 5 U.S.C. § 567(a)).

[44] OPM grades all candidates for administrative law judge positions in accordance with scores obtained in a full day written examination, an oral interview by a three person panel, and vouchers furnished by lawyers and judges familiar with their abilities and qualifying experience. Candidates who served in the armed forces have five points added to their scores and disabled veterans and other preference eligibles, married or related to disabled veterans, have ten points added under civil service laws. *See* 5 U.S.C. §§ 2108, 3309 (1982).

[45] S. 1275, 98th Cong., 1st Sess. § 2 (1983) (proposing codification at 5 U.S.C. §§ 562(b), 564(a)).

[46] *Id*. (proposing codification at 5 U.S.C. § 567). The pay provisions in the bill are couched in technical terms, but when translated provide a salary in the amount many senior administrative law judges now receive.

[47] *Id*. (proposing codification at 5 U.S.C. § 566(a)). This commission would be appointed by the Chief Judge of the United States Court of Appeals for the District of Columbia Circuit, the Chief Judge for the United States District Court for the District of Columbia Circuit, the Chairman of the Administrative Conference of the United States, the Chairman of the Administrative Law Section of the American Bar Association, and the President of the Federal Administrative Law Judges Conference. *Id*. (proposing codification at 5 U.S.C. § 566(b)).

Once its members are appointed,[49] the Council would have powers similar to those possessed by individual agencies over administrative law judges.[50] The bill, however, provides added responsibilities and duties to the Council.[51] Responsibility is also conferred upon the Council to make appropriate arrangements for continuing judicial education and training.[52]

Inasmuch as the legal specialties that concern agencies may change in the future, as will the number of judges needed to hear their cases, the Council is authorized to change the number and jurisdiction of the divisions.[53] In order to preclude the Council from completely converting the judges into "generalists," it may not reduce the number of divisions to less than four. On the other hand, to prevent a regressive movement toward employment of judges as "super-specialists," the Council may not increase the number of divisions to more than ten.[54]

The agencies would continue to have review power over decisions of the judges.

For two years from the date the Corps begins its operations, proceedings would continue to be conducted under the rules of practice promulgated by each agency.[55] After two years, the Council is authorized to prescribe uniform procedural rules. At that time, it also would report its findings and make recommendations for appropriate legislative reforms that would make review of the judges' decisions more efficient and accord greater finality to their decisions.[56] A separate study and report is required for each division.[57] This should cause the Council to take a hard look at the true nature of the various forms of administrative decisionmaking. It would require the Council to make distinctions between administrative adjudications where fairness and public satisfaction outweigh the need to accomodate agency efficiency.[58]

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[48] *Id.* (proposing codification at 5 U.S.C. § 566(e)(5)). Professor Abraham Dash noted this to be a novel methodology for screening judicial applicants, but since the bill acknowledges the President's right to reject, it should, in his opinion, withstand challenges that it unduly limits executive appointment powers contrary to the Constitution. *See infra* note 66.

[49] The bill provides for a five year term for the Chief Judge of the Corps but is silent as to the terms of the division chiefs. S. 1275, 98th Cong., 2d Sess. § 2 (1983) (proposing codification at 5 U.S.C. § 563(a)). However, the Federal Administrative Law Judges Conference proposed that they also serve five year terms that should be staggered to avoid undue interruption of the workings of the Council. Judge V. Palmer, Chairman of the Committee on the Corps of the Federal Administrative Law Judges Conference, Prepared Statement Presented at the Senate Hearings on S. 1275 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, 98th Cong., 1st Sess. 29 (June 23, 1983).

[50] *Compare* S. 1275, 98th Cong., 1st Sess. § 2 (1983) *with Ramspeck*, 345 U. S. at 133-43.

[51] S. 1275, 98th Cong., 1st Sess. § 2 (1983) (proposing codification at 5 U.S.C. § 565).

[52] *Id.* (proposing codification at 5 U.S.C. § 565(d)(6)).

[53] *Id.* (proposing codification at 5 U.S.C. § 564(b)).

[54] *Id.* (proposing codification at 5 U.S.C. § 564(a)).

The Corps would have jurisdiction over all matters presently required by the APA to be conducted by an administrative law judge in lieu of hearings conducted by the agency or its members.[59] The proposed legislation also confers jurisdiction upon the Corps to hear any other case referred by federal agencies and courts for determination on a hearing record.[60]

The legislation provides for the removal, suspension, reprimand, or disciplining of judges on the basis of incompetence neglect of duties, or misconduct.[61] Judges may also be removed or suspended for physical or mental disability.[62] Under present law, an administrative law judge may be removed, suspended, reduced in grade or pay, or furloughed for up to 30 days upon a showing of good cause by the employing agency in a hearing before the Merit Systems Protection Board.[63] The language in the bill uses the more explicit language employed by Congress to subject bankruptcy judges to removal proceedings.[64] To assure that complaints against the judges are investigated fairly and expeditiously, the bill provides for their processing by panels of administrative law judges for a system of peer review.[65]

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[55] *Id.* (proposing codification at 5 U.S.C. § 565(d)(7)).

[56] *Id.* § 3.

[57] *Id.*

[58] In his illuminating work on this subject, Professor Paul R. Verkuil, Dean of Tulane University School of Law, recognizes adjudications involving the imposition of sanctions as clearly being of this nature. *See* Verkuil, *The Emerging Concept of Administrative Procedure*, 78 COLUM. L. REV. 258, 295 (1978).

[59] S. 1275, 98th Cong., 1st Sess. § 2 (1983) (proposing codification at 5 U.S.C. § 568(a)).

[60] *Id.* (proposing codification at 5 U.S.C. § 568(d)).

[61] *Id.* (proposing codification at 5 U.S.C. § 569(a)(1)).

[62] *Id.*

[63] 5 U.S.C. § 7521 (1982).

[64] *See* 28 U.S.C.A. § 153(b) (West Supp. 1983). These provisions were enacted as appropriate to judges appointed pursuant to Article 1 of the Constitution who, unlike judges appointed pursuant to Article 3, do not have life tenure. *See also* Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982).

IV. THE SENATE HEARINGS ON SENATE BILL 1275

The Senate Committee on the Judiciary, Subcommittee on Administrative Practice and Procedure, has convened two hearings on Senate bill 1275.[66]

The Subcommittee heard first from a panel of administrative law judges, introduced by Judge Edwin S. Bernstein, President of the Federal Administrative Law Judges Conference.[67] Judge Bernstein emphasized that Senate bill 1275 was supported by each of the three organizations which represent administrative law judges: the Federal Administrative Law Judges Conference,[68] the National Conference of Administrative Law Judges,[69] and the Association of Administrative Law Judges, Inc.[70]

Judge Victor W. Palmer testified at length as Chairman of the Federal Administrative Law Judges Conference's Unified Corps Committee. He urged the enactment of Senate bill 1275 to redress urgent, critical problems adversely affecting Americans. Specifically, he called attention to those seeking Social Security benefits, facing the loss of licenses to engage in federally regulated businesses, those subjected to ever-increasing civil penalties for breach of federal regulations, and those otherwise dependent upon the fairness and impartiality of hearings conducted by federal administrative law judges.[71]

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[65] S. 1275, 98th Cong., 1st Sess. § 2 (1983) (proposing codification at 5 U.S.C. § 569(c)-(g)). The bill's peer review system is akin to that now applicable to federal district court and circuit court judges, pursuant to 28 U.S.C.A. § 372(c) (West Supp. 1983). This system's prototype has recently been implemented by the United States Department of Labor to handle complaints involving its administrative law judges.

[66] The Subcommittee consists of Senator Charles E. Grassley, Chairman (R. Iowa), Senator Howell Heflin, Ranking Minority Member (D. Ala.), Senator Paul Laxalt (R. Nev.), Senator Arlen Specter (R. Pa.), and Senator Max Baucus, (D. Mont.). The hearings were held on June 23 and September 20, 1983.

See Administrative Law Judge Corps Act: Hearings on S.1275 Before the Subcomm. on Adminstrative Practice and Procedure of the Senate Comm. on the Judiciary, 98th Cong., 1st Sess. (1983) [hereinafter cited as *Hearings on S. 1275*].

[67] *See id.* at 4-24. The panel consisted of Judge Edwin S. Bernstein, Judge Victor W. Palmer, Chief Judge Duane R. Harves, and Judge Frank B. Borowiec.

[68] The Federal Administrative Law Judges Conference (FALJC) includes nearly 800 members and represents judges in each of the twenty-nine federal agencies that hold hearings conducted by administrative law judges. *Id.* at 4.

[69] The National Conference of Administrative Law Judges includes both federal and state administrative law judges as its members. It is a constituent of the American Bar Association's Judicial Administration Division which, at its 1983 mid-year meeting, passed a resolution favoring the establishment of federal administrative law judges as a separate, independent and unified corps. *Id.*

[70] The Association of Administrative Law Judges, Inc., represents the nearly 800 administrative law judges employed at the Social Security Administration. *Id.*

Judge Palmer noted that eight states have transferred their administrative law judges to independent central panels to eliminate any dependency upon agencies whose programs are directly affected by the judges' decisions. At the same time, the federal government still assigns its administrative law judges to twenty-nine departments and agencies where they are maintained and supported as subordinate employees.[72] He argued that transfer of federal administrative law judges to an independent corps where each would be assigned to a specialized division in accordance with his or her expertise, combined the best features of the present system — specialization and merit selection — with the following four improvements:

1. *Public Perception of Fairness of Hearings*

Assigning judges to a separate, unified corps instead of individual departments and agencies would eliminate the present public perception that administrative law judges, particularly those who were previously staff members, have an institutional bias in favor of the agency. Their separation from the departments and agencies who often appear before them as parties would assure actual fairness and impartiality, and restore the public's confidence that justice is indeed being done.

2. *More Efficient Use of Administrative Law Judges*

Under the present system, the management of judges and cases is divided among twenty-nine separate departments and agencies precluding the effective assignment of administrative law judges in accordance with the varying peaks and valleys in their case loads. Establishing the judges as a unified corps would enable this highly trained expert resource within the federal government to be efficiently employed to dispose of administrative proceedings.

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[71] *Id.* at 30-35. The majority of administrative law judges in the federal government are no longer assigned to proceedings involving ratemaking, licensing, or the establishment of agency rules and regulations. *Id.* at 28-29. As a chart attached to Judge Palmer's testimony demonstrated, only 6.8 percent of them are presently so employed. This is in marked contrast to the time of the APA's enactment when 63.8 percent were assigned to such cases. *Id.* at 53. Currently, administrative law judges mainly preside over adversarial type hearings and disputed claims in which the employing agency is a real party-in-interest. The change has raised the level of judicial independence needed for the administrative process to be just. *Id.* at 29-31.

[72] *Id.* at 26, 31, 40-41.

3. *Significant Cost Savings*

The establishment of a unified corps would allow improved case load management thereby reducing personnel requirements. Furthermore, substantial savings would be derived by eliminating the replication of hearing facilities and support staffs at the twenty-nine departments and agencies. Additional savings and increased productivity would be achieved through the use of modern office equipment and computers throughout the corps.

4. *Availability of Administrative Law Judges to Assist Overloaded Federal Courts*

The bill expressly authorizes federal courts to refer specialized proceedings to administrative law judges serving as special masters. Under this provision, an existing cadre of administrative law judges would be identified as being immediately available to assist the federal judiciary and provide an inexpensive remedy to the pressing problems now facing the federal courts.[73]

Judge Duane R. Harves, Chief Hearing Examiner, State of Minnesota, Office of Administrative Hearings, next testified in support of the proposed legislation. He noted that on January 1, 1976, Minnesota created a totally independent hearing agency similar to the unified corps that Senate bill 1275 would establish. He stated that the creation of the centralized Minnesota Office of Hearings had dramatically decreased costs of hearings, increased efficiencies, and decreased the time in which decisions were issued.[74] He testified that the division of the office into areas of special expertise had preserved specialization and, in every way, the Minnesota experience had been a resounding success.[75]

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[73] *Id.* at 46.

[74] *Id.* at 8-11. Judge Harves supplied statistics showing that the cost of hearings to the Minnesota Public Utilities Commission was reduced from $311,330 in fiscal year 1977, the first year his centralized hearings office was in operation, to $184,219 for fiscal year 1982. The cost of hearings conducted for the Department of Commerce fell from $120,000 to less than $60,000. *Id.* at 87. Despite inflation and the doubling of the salaries paid to hearing examiners, Minnesota has not had to increase the amounts budgeted for his office's operation. *Id.* Moreover, the total staff was reduced by forty percent, with the number of examiners reduced by twenty-seven percent. *Id.* at 88. The length of time for decisions to be issued in workers' compensation cases fell from 101 days following the close of the hearing record in December 1981, to forty-six days in May 1983; and, the average backlog per examiner likewise decreased from fifteen cases to four cases. *Id.* at 89.

The final panel member, Judge Borowiec, testified on behalf of the Association of Administrative Law Judges, Inc., and its administrative law judges employed at the Social Security Administration, Department of Health and Human Services.[76] He reinforced Judge Palmer's testimony and described the agency pressures that have been brought to bear upon the judges at the Department of Health and Human Services.[77] In their opinion, he advised, such agency pressures squarely conflicted with the traditional American standard of justice and the enactment of Senate bill 1275 was essential.

The next panel included Herbert E. Forrest, Esq., and Professor Abraham Dash. Mr. Forrest is a partner in the Washington law firm of Steptoe and Johnson and is President of the Federal Communications Bar Association. Professor Dash is a member of the University of Maryland Law School faculty and has written extensively in the field of administrative law. Both Mr. Forrest and Professor Dash supported the bill.

Mr. Forrest was critical of the present system under which administrative law judges "are housed, sustained, and are ranked as (agency) employees. . . . [N]ot only are they seen as having, but they do in fact have, however unconsciously, a bias toward the agency which is often a party to the proceeding, and a partiality toward the view of agency staff."[78] On the merits of whether judges should be specialists, Mr. Forrest stated:

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[75] *Id.* at 9-10. Although unable to appear in person, Judge Howard H. Kestin, Director, State of New Jersey Office of Administrative Law, reported similar dramatic benefits under the New Jersey centralized system established in early 1979. Since that time, the number of hearing officers has decreased from 130 to forty-five, each of whom disposed of an average of 226 cases in fiscal year 1982. Despite inflation, the average cost of processing a case decreased from $540 in fiscal year 1980 to $508 in fiscal year 1982. *Id.* at 75-77.

[76] At present, there are 769 administrative law judges at this agency.

[77] *See* SUBCOMM. ON OVERSIGHT OF GOV'T MANAGEMENT OF THE SENATE COMM. ON GOV'TAL AFFAIRS, THE ROLE OF ADMINISTRATIVE LAW JUDGE IN THE TITLE II SOCIAL SECURITY DISABILITY INSURANCE PROGRAM, S. REP. NO. 111, 98th Cong., 1st Sess. (1983) [hereinafter cited as THE ROLE OF THE ADMINISTRATIVE LAW JUDGE]. Based upon the hearing the Subcommittee conducted on this issue on June 8, 1983, its Chairman, Senator William S. Cohen and Ranking Minority Member, Senator Carl Levin, reported:

> The Subcommittee's principal finding is that the SSA is pressuring its administrative law judges to reduce the rate at which they allow disabled persons to participate in or continue to participate in the Social Security disability program. (The SSA has been successful in its efforts as evidenced by recent statistics showing a dramatic decline in the administrative law judge allowance rate in the past year and a half from 67.2 percent in mid-1982, to 51.9 percent in June 1983). The Subcommittee also finds that the SSA is imposing this pressure through several means including the inequitable and unjustified targeting of only allowance decisions and high allowance judges for review pursuant to an amendment sponsored by Senator Henry Bellmon and passed in 1980 (Bellmon Review), and the use of minimum production quotas and productivity goals.

Id. at III.

> [I]t makes all trial and appellate judges the greater for their experience that they do not sit with the narrow tunnel vision of specialization, but are exposed, not only to new ideas, and new situations, but also to different views and perceptions of old issues, for example, how different agencies look at ratemaking to derive a more comprehensive, balanced and creative decision. It may not be something that can be demonstrated empirically, but I believe it's there.[79]

Professor Dash stated that the concept of a unified corps of administrative law judges had been one that was proposed as far back as 1946 when the Administrative Procedure Act came into being, and the essential question was not whether a unified corps of federal administrative law judges should be enacted, but, why it still had not been enacted.[80]

The final witness at the initial hearing was Loren A. Smith, Chairman, Administrative Conference of the United States. Chairman Smith listed the chief benefits of Senate bill 1275 as increased efficiency, cost savings, greater public confidence in the impartiality and independence of administrative law judges, and diversification of the judges' experience. He further observed that it would allow an objective, credible system to be designed for evaluating the judges' performance, and could lead to a more unified, coherent approach by Congress to agency adjudication. As for the bill's negative implications, he cited reduced expertise, the creation of a new bureaucracy, unforeseen interference with the ultimate decisional responsibility of individual agencies, and the need to devise an equitable system for allocating the judges to the agencies. The latter could be allocated by pro rata sharing of adjudicative costs, to prevent drawing too liberally upon the judges' services when not actually needed. On balance, he favored the corps concept embodied in the bill on efficiency grounds, and suggested that an experimental model might be created first for a four year trial period, to include only those judges in the fifteen smallest agencies.[81]

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[78] *Hearings on S. 1275*, *supra* note 66, at 97.

[79] *Id.*

[80] *Id.* at 98.

[81] *Id.* at 108-12. The Administrative Conference consists of ninety-one members

At the second hearing on September 20, 1983, Mr. Geoffrey S. Stewart and Mr. Joseph A. Morris testified for the Department of Justice and the Office of Personnel Management.[82]

Mr. Stewart offered the view of the Department of Justice that a change of such magnitude in the national administrative judiciary called for thorough reflection and detailed empirical study. In the Department's opinion, administrative law judges presently had sufficient protections to assure their independence.[83] He also expressed concern that the proposal would create a "generalist corps" of administrative law judges, and would "unnecessarily impede the implementation of agency policies."[84] Finally, he presented objections to several details of the bill. He took issue with the creation of a collegially functioning Council consisting of the Corps' chief judge and division chiefs as a means of governing the Corps' operation and appointment of new administrative law judges; the creation of a Complaints Resolution Board to discipline judges under a system of peer review; and the creation of a Judicial Nomination Commission to recommend qualified administrative law judges for presidential appointments as members of the Council.

Mr. Morris argued that the legislation would dilute the agency program expertise of administrative law judges and agencies would not be able to rely upon timely processing of hearing requests. He emphasized that there was a need for "agency administrative control over [administrative law judges]."[85] Additionally, he objected to the bill's salary provisions.

Althea T. Simmons, Director of the Washington Bureau of National Association for the Advancement of Colored People questioned whether the bill would promote the independence of administrative law judges or increase their efficiency. In her opinion, the Administrative Procedure Act amply insulated administra-

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and twenty-two liaison representatives. It includes representatives of federal departments and agencies, the private bar, law schools, and professional associations. One of the authors serves as a liaison representative to the Administrative Conference as President of the Federal Administrative Law Judges Conference.

[82] Mr. Stewart is Deputy Assistant Attorney General, Office of Legal Policy at Department of Justice. *Id.* at 125. Mr. Morris is General Counsel at Office of Personnel Management. *Id.* at 137.

[83] *Id.* at 126. Jonathan C. Rose, Assistant Attorney General, Office of Legal Policy, clarified that the testimony given on behalf of the Department of Justice "does not reflect any disagreement with the laudable objectives of the bill's proponents. . . ." Letter from Jonathan C. Rose to Victor W. Palmer (Dec. 13, 1983).

[84] *Hearings on S. 1275*, *supra* note 66, at 126, 127.

[85] *Id.* at 141.

tive law judges from inappropriate agency control. She acknowledged, however, that with respect to the Social Security judges, "the intrusion of that agency upon the decisional independence of the administrative law judges appears highly inappropriate."[86] The more desirable legislative cure for that problem, in her opinion, was to establish an independent Health and Human Services Review Commission to which all Social Security judges should be transferred. She was also skeptical as to the advantages of judicial "generalists" over "specialists" and expressed concern regarding the potential for politicization of a unified corps of administrative law judges.[87]

Next, John T. Miller, Jr., an attorney with many years of experience in administrative law, testified in support of the Bill.[88] Mr. Miller declared that an administrative law judge corps would assure uniform work loads, thereby enabling better use of administrative law judge time. At present, he continued, each agency and department determines whether funds will be provided for the continuing legal education of their administrative law judges. "At a time when the judiciary throughout the nation has come to recognize the value of such education in terms of more effective and efficient administration of justice, there is an obvious deficiency in the opportunities in the funding of continuing education for federal [administrative law judges]."[89] He expressed confidence that a unified corps would better attend to the need for continuing education and training of administrative law judges. Mr. Miller added that emphasis on expertise is often a misplaced value, stressing the example of federal courts where specific expertise has not been a necessary qualification of judges who review agency decisions.

Acting on behalf of an *ad hoc* committee of fifteen federal administrative law judges who favored continuation of the status quo, Judge Joseph B. Kennedy testified that the current process provided for sufficient independence of federal administrative law judges.[90] He contended that the situation at Social Security was the only known circumstance in which administrative law judges had been subjected to an inappropriate degree of agency control. He suggested that the establishment of an independent review commission to house Social Security judges would be a more appropriate response to that problem. He disagreed that the bill would result in substantial savings; rather the proposal would "interfere with the agency's ability to perform the functions for which they were created."[91] In his opinion, although the bill purported to create specialized divisions, the existence of those divisions would be temporary and readily altered by vote of the Council of the Corps. He concluded that the proposal would create an unwieldy bureaucracy requiring additional employees.

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[86] *Id.* at 165.
[87] *Id.* at 165-67.
[88] *Id.* at 152.
[89] *Id.*
[90] *Id.* at 156.

The next witness was Robert H. Joost who testified as a private citizen supporting the creation of a unified corps of administrative law judges. He remarked that an administrative law judge's federal agency employer almost always appeared before the judge as a litigant and that this necessarily created the appearance of unfairness. Similarly, appropriate agency disciplining of a judge was difficult because it might appear to have improperly affected his or her judicial independence. Mr. Joost then submitted wide-ranging recommendations he believed would improve the bill: transferring responsibility for examining future applicants from OPM to the Corps; expanding the types of legal experience which would qualify applicants; further dividing the divisions of the Corps into more specialized subdivisions or panels; and, creating a class of GS 13/14 "Administrative Examiners" to hear less important cases thereby creating a career ladder for administrative law judges.[92]

The final witness, Professor Victor G. Rosenblum testified that in his 1975 study for the Administrative Conference of the United States, he recommended that the time was not yet right for the creation of an administrative law judge corps. As a witness in 1983, however, he stated: "I'm convinced that now is the hour for such a Corps."[93] He then reviewed his rationale in 1975 and explained how three of the four factors which accounted for his position at that time had significantly changed between 1975 and 1983.The factor he found unchanged was proof that the operation of the administrative law judge program would not be impaired by political corruption or other improper influences.[94]

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[91] *Id.* at 184.

[92] *Id.* at 191-93. Mr. Joost is a former member of the professional staff of the Senate Judiciary Committee and at present is a hearing officer for the Commodity Futures Trading Commission.

[93] *Id.* at 194. Professor Rosenblum has been a professor of law at Northwestern University since 1958, is a past chairman of the Administrative Law Section of the American Bar Association, and is the current vice-president of the American Judicature Society. His article entitled *Contexts and Contents of "For Good Cause" As Criterion for Removal of Administrative Law Judges: Legal and Policy Factors* also appears in this symposium.

One factor which had changed was the failure of a compromise made between the Administrative Conference and the Civil Service Commission in 1962. Under that compromise the Administrative Conference had refrained from recommending removal of the hearing examiner program from the Commission on the basis of its promise to institute improvements responsive to a detailed critique of the Commission's operation of the program by Professor Wilbur Lester, then staff director of the Administrative Conference's Committee on Personnel.[95] Professor Rosenblum stated that the Commission's promise was not kept:

> The period of constructive implementation of the Conference"s 1962 recommendation which was exemplified by such promising steps as utilization of a comprehensive written examination, involvment of renowned practitioners and members of the academic community in the oral phase of the examination, addition of trial experience as one basis for qualification for appointment, and establishment of the La Macchia Committee to study multiple dimensions of the status and utilization of administrative law judges, has long since lapsed into limbo. . . .
>
> The change in agency title in 1979 from Civil Service Commission to Office of Personnel Management and the division of functions between OPM and the Merit Systems Protection Board wrought no concomitant renewal of reformist energy or zeal. . . .
>
> General Accounting Office studies of management of the administrative law process offer no reason to believe that [OPM] has made a salient priority of the implementation or evaluation of proposals for improving roles, functions and performance of [administrative law judges]. On the contrary, GAO has been overtly critical of management of the administrative law process.[96]

Another factor which had changed was the development of empirical data substantiating the achievement of major benefits through implementation of central panel systems in seven states. The new evidence, he found, demonstrated "clearly that the corps concept is practicable and feasible."[97]

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[94] *Id.*

[95] *Id.* at 194-95; *see* W. LESTER, REPORT ON SECTION II HEARING EXAMINERS TO THE COMMITTEE ON PERSONNEL OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES 28 (1962).

[96] *Hearings on S. 1275*, *supra* note 66, at 195-96.

[97] *Id.* at 196-97. The seven States are California, Colorado, Florida, Massachusetts, Minnesota, New Jersey and Tennessee. *See generally* M. RICH & W. BRUCAR, THE CENTRAL PANEL SYSTEM FOR ADMINISTRATIVE LAW JUDGES: A SURVEY OF SEVEN

Professor Rosenblum concluded that the Civil Service Commission and its successor, the Office of Personnel Management, had failed to follow through on the LaMacchia Committee recommendations[98] and failed to develop an effective administrative law judge program: a "fresh start through the corps concept is warranted, promising and practicable in Senate bill 1275."[99]

V. THE ARGUMENTS FOR AND AGAINST ENACTMENT

Persuasive arguments for the establishment of federal administrative law judges as an independent, unified corps through enactment of Senate bill 1275 have been advanced by the practicing bar,[100] eminent professors of law,[101] and the administrative law judges.[102]

Opponents, however, argue that with the exception of the Social Security Administration (SSA), there is no evidence of agency interference with the judicial functions of administrative law judges. They suggest that the more appropriate legislative response would be to vest jurisdiction over social security cases in a new, independent review commission to which administrative law judges now employed by SSA would be transferred. Additionally, opponents have articulated fears that enactment of the bill will lead to politicization of the administrative law judge system, a reduction of agency efficiency through agency loss of control of their dockets, the replacement of "specialists" by "generalists," and the creation of an even more expensive, unwieldy bureaucracy.[103]

The strength of the arguments favoring the Corps' establishment perhaps are measured best in the context of these doubts and fears.

A. *Interference With Judicial Functions of Administrative Law Judges by Agency Employers*

Witnesses who testified in support of the Heflin bill did not un-

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STATES (1983). The State of Washington, on July 1, 1982, became the eighth State to employ a central panel system.

[98] *Hearings on S. 1275*, *supra* note 66, at 197-98. *See supra* note 37 and accompanying text. This study was conducted by a panel of administrative law judges chaired by the Civil Service Commission's then Deputy Counsel.

[99] *Hearings on S. 1275*, *supra* note 66, at 198.

[100] *See supra* text accompanying notes 88-89.

[101] *See supra* text accompanying note 92-99.

[102] *See supra* text accompanying notes 67-77.

[103] *See supra* text accompanying notes 82-87.

dertake a comprehensive survey of practices at every federal department and agency which interfere with the judicial functions of administrative law judges in their employ. The focus on agency interference and pressuring was restricted to the practices at the SSA, the current subject of extensive media coverage[104] and a congressional oversight hearing which resulted in the issuance of a severely critical report.[105]

The report documented SSA's pressuring of its administrative law judges to decide against claims by the disabled.[106] It charged that pressure was exerted through the use of minimum production quotas, targeting decisions by high allowance judges for agency review, improperly using internal guidelines to bind its judges, and prohibiting them from following selected court precedents.[107] A New York Times editorial[108] also charged that these practices by the SSA were in response to a decision by the administration to eliminate fraudulent claims and reduce the $18 billion year expended to pay 4 million workers and their dependents. SSA's responsiveness to the administration's policies caused it to use its position as the employer of administrative law judges to interfere with their judicial functions.[109]

Every federal agency where administrative law judges are employed is motivated to be responsive to its administration's policies. It is more difficult, however, to document equivalent pressuring by other agencies. Because SSA employs 769 administrative law judges[110] in approximately 100 offices, it necessarily communicates its policy in writing. Other agencies, that have a smaller cadre of judges located in a single office, communicate orally. Even so, instances of interference with the judicial functions of administrative law judges by other agencies have surfaced.[111]

In 1976, the Undersecretary of the Interior disagreed with a decision by an administrative law judge at that agency.[112] Instead of simply reversing the decision, as was the agency's right, the Undersecretary placed an official reprimand in the judge's personnel file, placing the judge's qualifications under a cloud and hindering his opportunities for future promotion or new employment. The reprimand was later expunged pursuant to an opinion by the Attorney General, but only after the expenditure of considerable legal fees which the Federal Administrative Law Judges Conference helped to defray. In finding that the reprimand conflicted with the APA, the Attorney General nonetheless recognized the right of an agency to reprimand its judges as well as its right "to assign or withhold parking spaces, . . . establish working hours, [and] assign secretarial assistance."[113]

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[104] *See, e.g.*, *Give the Disabled a Grandfather*, N.Y. Times, Oct. 18, 1983, at A30, col. 1.; Public Broadcasting Station Documentary, Who Decides Disability? (June 20, 1983) (Transcript available through WGBH-TV, 125 Western Avenue, Boston MA 02134).

[105] *See supra* note 77.

[106] *Id.*

[107] *Id.*

[108] *Give the Disabled a Grandfather*, N.Y. Times, Oct. 18, 1983, at A30, col. 1.

[109] *Id.*

[110] OFFICE OF PERSONNEL MANAGEMENT, TOTAL NUMBER OF ALJs ON BOARD BY GRADE AND AGENCY AS OF NOV. 21, 1983 (1984).

[111] 43 Op. Att'y Gen. 1 (1977).

Administrative law judges at every federal agency are vulnerable to such discipline. The fact that wrongful actions may eventually be reversed after costly litigation provides little comfort.

Although the APA requires administrative law judges to be assigned to cases in rotation,[114] the Supreme Court in *Ramspeck* interpreted the modifying words "so far as practicable" to allow assignments on the basis of "the experience and ability of the examiner available."[115] This interpretation has permitted questionable agency practices in making case assignments. *PATCO v. Federal Labor Relations Authority*,[116] contains a disturbing finding respecting the assignment of the Air Controller's strike case: "On August 4, 1981 [Federal Labor Relations Authority (FLRA) members]. . . met with [FLRA's Chief Administrative Law Judge]. . . at lunch to discuss the procedural aspects of the PATCO case. During that discussion, it was suggested that [the Chief Judge]. . . appoint a capable judge, preferably himself, to hear the PATCO case. . . ."[117] FLRA's Chief Judge complied and assigned the case to himself.

On September 5, 1980, in a hearing before the Consumer Subcommittee of the Senate Committee on Commerce, Science and Transportation, FTC's Chief Judge testified that all eleven of the FTC's administrative law judges, at one time or another, served as staff attorneys at the Commission.[118] He further confirmed that in

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[112] *Id*.

[113] *Id*.

[114] 5. U.S.C. § 3105 (1982).

[115] 345 U.S. at 139-40.

[116] 685 F.2d 547 (D.C. Cir. 1982).

[117] *Id*. at 619.

[118] *Administrative Law Judge System: Hearings Before the Subcomm. for Consum-*

August 1978, the FTC judge assigned to a case involving the Kellogg Company[119] advised the agency of his plans to retire. The FTC retained him on the case through a special contract which gave him both his pension and salary while he served "at the will of the appointing officer."[120] Kellogg, upon being informed of the arrangement, vigorously objected and the judge was replaced.[121]

Agency rules of practice are typically prepared by their general counsel. This can result in rules that favor the agency over the other parties who may appear before its administrative law judges.[122] The Heflin bill's provisions for the establishment of uniform rules of practice by the Corps, led one agency official to make this enlightening protest:

> § 565(d)(7) authorizes the policymaking body of the Corps to "prescribe the rules of practice and procedure for the conduct of proceedings before the Corps." As Oliver Wendell Holmes once said, "substantive law is secreted in the interstices of procedure." The effect of § 565(d)(7) will be to surrender, in subtle ways, part of the Agency's substantive rulemaking authority to the Corps.[123]

The NLRB's rules of practice were before the Supreme Court in *NLRB v. Robbins Tire & Rubber Co.*[124] which upheld the board's right to bar prehearing discovery. However, this one-sided aspect of its rules of practice evoked the following comment from Justice Powell:

> I do not read the Act to authorize agencies to adopt or adhere to nonstatutory rules barring all prehearing disclosure of investigatory records. The Court reasons, . . . that such disclosure — which is deemed "premature" only because it is in advance of the time of release set by the agency — will enable "suspected violators" . . . to learn the Board's case in advance and frustrate the

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ers of the Senate Comm. on Commerce, Science, and Transportation, 96th Cong., 2d Sess. 117 (1980) (Statement of Ernest Barnes, C.A.L.J., F.T.C.) [hereinafter cited as *1980 Hearings*].

[119] *Kellogg Co.*, 99 F.T.C. 8 (1982).

[120] *1980 Hearings*, *supra* note 118, at 117.

[121] *Id.*

[122] The Department of Agriculture's rules of practice, for example, prohibit its administrative law judges from dismissing on the pleadings, any of the complaints Department lawyers file in enforcement proceedings. 7 C.F.R. § 1.143(b) (1983). Conversely, in proceedings where Agriculture defends petitions seeking relief, the judges are directed to entertain its motions to dismiss petitions for being defective in form. *Id.* § 900.52(c).

[123] Environmental Protection Agency Memorandum from Ronald L. McCallum, Judicial Officer, to Virginia Gibbons, Office of Legislation (July 14, 1983).

[124] 437 U.S. 214 (1978).

> proceedings or construct defenses which would permit violations to go unremedied. . . . This assumption is not only inconsistent with the congressional judgment expressed in the Federal Rules of Civil Procedure that "trial by ambush". . . may well disserve the cause of truth, but it also threatens to undermine the Act's overall presumption of disclosure, at least during the pendancy of enforcement proceedings.[125]

The Senate Subcommittee on Oversight of Government Management described SSA's refusal to accord precedential weight to selected court decisions as a policy of "non-acquiescence."[126] This policy of non-acquiescence is not limited to SSA.[127] The right of agencies to engage in these policies involves complex and difficult constitutional questions.[128] Enactment of Senate bill 1275 would not in itself resolve the constitutional problems, but its provisions do call for a study, division by division, examining the ways in which agencies review decisions by administrative law judges. This kind of review undertaken by the Corps' Council would indeed be an important first step.

Even if no constitutional issues existed, when an agency directs its administrative law judges to ignore otherwise binding court precedents, the judges are being asked to give priority to their duties as employees over their judicial responsibility.[129]

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[125] *Id.* at 253 (Powell, J., concurring and dissenting) (citations omitted).

[126] *See supra* note 77.

[127] The Subcommittee indicated that SSA argued "its policy was no different than that of the Internal Revenue Service (IRS)." THE ROLE OF THE ADMINISTRATIVE LAW JUDGE, *supra* note 77, at 27.

[128] The subcommittee report referred to three principal constitutional issues: (1) the doctrine of separation of powers; (2) the doctrine of *stare decisis*; and (3) the due process rights of litigants. *Id.* at 28-29. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); Yellow Taxi Co. of Minn. v. NLRB, 721 F.2d 366 (D.C. Cir. 1983); Frock v. United States R.R. Retirement Bd., 685 F.2d 1041 (7th Cir. 1982), *cert denied*, 103 S. Ct. 1185 (1982); S & H Riggers & Erectors, Inc. v. OSHRC, 659 F.2d 1273 (5th Cir. 1981); Jones & Laughlin Steel Corp. v. Marshall, 636 F.2d 32, 33 (3d Cir. 1980); ITT World Communications v. FCC, 635 F.2d 32, 43 (2d Cir. 1980); Ithaca College v. NLRB, 623 F.2d 224, 228-29 (2d Cir.), *cert. denied*, 449 U.S. 975 (1980); Mary Thompson Hosp., Inc. v. NLRB, 621 F.2d 458, 864 (7th Cir. 1980); Allegheny Gen. Hosp. v. NLRB, 608 F.2d 965, 970 (3d Cir. 1979); *see also* Siedlecki v. Schweiker, 563 F. Supp. 43, 46-48 (W.D. Wash. 1983); Chee v. Schweiker, 563 F. Supp. 1362, 1364-65 (D. Ariz. 1983); Hillhouse v. Harris, 547 F. Supp. 88, 93 (W.D. Ark. 1982), *aff'd*, 715 F.2d 428 (1983).

[129] The Senate Subcommittee stated the problem as follows:

> The [administrative law judges] are also detrimentally affected by the SSA's policy of non-acquiescence. The [administrative law judges] predicament was described in *Hillhouse* v. *Harris*, when the court indicated that the [administrative law judges] are caught in the most unenviable position of "trying to serve two masters; the courts and the Secretary of Health and Human Services."

The problem caused by agency refusals[130] to accede to court decisions interpretory of the laws agencies administer was stated by Professor Jaffe:

> The scope of judicial review is ultimately conditioned and determined by the major proposition that the constitutional courts of this country are the acknowledged architects and guarantors of the integrity of the legal system. . . . An agency is not an island entire of itself. . . . The very subordination of the agency to judicial jurisdiction is intended to proclaim the premise that each agency is to be brought into harmony with the totality of the law;. . .[131]

B. *Politicization*

Those who would maintain the status quo argue that the Corps' establishment must ultimately lead to destruction of the present system for merit appointment of federal administrative law judges. They fear that as administrative law judges stand separate and apart from agencies, and have heightened visibility, there will be a concomitant increase in pressures to discard the merit selection system. They view the bill's provisions for Presidential appointment of the chief judge and division chiefs as a template which will eventually apply to all administrative law judge appointments.[132]

The fear is unfounded. The bill does not alter the present sys-

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> Moreover, this situation is demoralizing to the [administrative law judges] who know that their judicial efforts may be meaningless. If they adhere to the SSA's non-acquiescence ruling, their decisions may be overturned in Federal court because they failed to follow prededent; and if they adhere to the courts' decisions, their decisions may be overturned by the SSA through the Appeals Council. To say the least, this practice creates a professional and judicial quandary for the [administrative law judge]."

THE ROLE OF THE ADMINISTRATIVE LAW JUDGE, *supra* note 77, at 30.

[130] In Yellow Taxi Company of Minneapolis v. NLRB, 721 F.2d 366 (D.C. Cir. 1983), the court stated: "No court can overlook an agency's defiant refusal to follow well established law. . . . Some members of the Board have historically arrogated to themselves the authority to 'disagree' with judicial precedent." *Id*. at 382. In justifying its refusal to give precedential weight to a decision by a United States circuit court, another agency explained the decision was the result of "judicial illiteracy," or the court "was so busy that it brushed the case aside in order to avoid the onerous chore of giving full consideration to the case," or was an attempt to avoid "summary reversal by the Supreme Court" through "disguise" of the court's real motive. *In re* Shatkin, 34 Agric. Dec. 296, 307-13 (1979) (discussing Economou v. USDA, 494 F.2d 519 (2d Cir. 1974)).

[131] Butz v. Glover Livestock Comm'n Co., 411 U.S. 182, 190-91 (1973) (Stewart, J., dissenting) (quoting L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 589-90 (1965)).

[132] *See supra* text accompanying notes 82-87 & 90-91.

tem of merit selection of administrative law judges.[133] Nor is there any reason to believe that its passage will lead to modification of this system.

The bill requires council members to be selected from administrative law judges who possess five years prior experience. Screening of applicants would be administered by a panel selected by two federal judges, the Chairman of ACUS, and leading members of the bar and the administrative law judge community.[134] These requirements, taken together, make it unlikely that the positions will go to those whose only qualification is loyalty to the political party in power. Moreover, provisions in the bill for processing complaints of incompetence or misconduct are equally applicable to council members and may be instituted by anyone, including administrative law judges who believe their functions have been improperly influenced by council members.[135]

It has also been suggested that placing administrative law judges under the control of politically appointed division chiefs and the chief judge, will lead to politicization of the Corps, but such a system would be far less enmeshed in politics than the present one which subordinates the judges to political appointees. Currently agency heads are committed to the policies of the administration in office, whereas the chief judge and division chiefs of an independent Corps would have no such commitments.

C. *Reduced Efficiency When Agencies Lose Control of Their Dockets and "Generalists" Replace "Specialists"*

Critics of the bill insist that because a unified corps will not be as responsive to agency needs and priorities, case backlogs must result unless agencies retain control over the dockets.[136] As with any other government agency, however, the Corps will be answerable to the President and the Congress for budgeted funds and must be responsive to such criticisms. Virtually every tribunal has procedures for according time priorities to matters requiring expedited treatment.[137] Similar procedures could be mandated for the Corps.

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[133] *See* S. 1275, 98th Cong., 1st Sess. § 2 (1983) (proposing codification at 5 U.S.C. § 567(a)).

[134] *See id.* § 4.

[135] *See id.* § 2 (proposing codification at 5 U.S.C. § 569).

[136] *See Hearings on S. 1275*, *supra* note 66, at 133-35 (statement of Geoffrey S. Stewart, Deputy Assistant Att'y Gen., Office of Legal Policy, Dep't of Justice); *id.* at 294-95 (statement of C.M. Butler III, Chairman, FERC).

[137] Rule 12 of Uniform Rules of Procedure for Boards of Contract Appeals under

When the Comptroller General studied the administrative law process, he concluded that the delays that have plagued it are not attributable to administrative law judges. There are two major causes for delays in the administrative process — extensive agency review of administrative law judges' decisions and the use of more complex judicial procedures than necessary to resolve some disputes."[138] The positive aspect of reduction in agency control over dockets is that opportunities to manipulate or predict case assignments would end.

Agency officials have also voiced concern that program expertise may be lost through the Corps' establishment. The bill, however, recognizes the importance of specialized expertise and provides for its continuance. The Corps would initially consist of seven divisions which the Council could expand to ten. The Council could also achieve more intensive specialization within the divisions through regulations establishing special panels or sections.

The Corps' divisions have been structured in accordance with major specialties of administrative law. Judges presently employed by federal agencies would be assigned to divisions on the basis of their existing legal expertise. The powers conferred upon the Corps' Council permit it to require new judges or judges seeking transfers to participate in appropriate training programs prior to assignment to a division.[139] Optimally, a division chief would assign complex cases from an agency to judges who previously served there or otherwise have proven expertise in that area. As each judge acquired experience in new fields of expertise, all would eventually be qualified to hear any case assigned to the division.

Many knowledgeable educators, practitioners and members of the judiciary unequivocally state that the importance of specialization is overemphasized. Those who advocate to the contrary, exaggerate the time it would take to learn various specialties of administrative law.[140] As John T. Miller, a private practitioner of

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the Contract Disputes Act of 1978, promulgated by Office of Management and Budget for all federal boards of contract appeals, establishes both expedited procedures for small claims and accelerated procedures for various other cases. 10 C.F.R. § 1023.20 (1983).

[138] COMPTROLLER GENERAL'S REPORT TO THE CONGRESS, ADMINISTRATIVE LAW PROCESS: BETTER MANAGEMENT IS NEEDED, FPCD078-25, Cover Sheet (May 15, 1978). *See also* COMPTROLLER GENERAL'S REPORT TO THE CONGRESS, MANAGEMENT IMPROVEMENTS IN THE ADMINISTRATIVE LAW PROCESS: MUCH REMAINS TO BE DONE, FPCD-79-44 (May 27, 1979) (follow-up report).

[139] S. 1275, 98th Cong., 1st Sess. § 2 (1983) (proposing codification at 5 U.S.C. § 561).

[140] One of the authors of this article serves the Department of Agriculture which administers no less than fifty separate statutes. Each time the responsibility for a statute

law who testified at the Senate Judiciary Committee hearing asserted: " It has not been in the Anglo-American tradition to appoint lawyers as judges on the basis of a narrow, and, perhaps, temporary expertise. . . . No lawyer should be appointed an [Administrative Law Judge] who lacks the energy, intellect and discipline to acquire needed expertise."[141]

D. *The Corps Will Not Be a More Expensive, Unwieldy Bureaucracy*

There is a current perception that an agency, once created, rapidly expands its staff and budget to become a self-perpetuating empire. This is the *ratio decidendi* of the new sunset laws designed to cause agencies to self-destruct unless they can affirmatively demonstrate their ongoing usefulness. Those who oppose the establishment of administrative law judges as an independent, unified corps, project a similar self-aggrandizing scenario.

But the work of the Corps will never be of its own making. Every adjudicative function Congress entrusts to the Executive Branch creates a correlative need for fair and impartial arbiters. The proposed legislation merely assembles, under one supervisory authority, those who hear APA-type proceedings. The work will be there whether or not the Corps is established. The costs of conducting proceedings with a corps in place should be less than under the present system.

There is no practical method at present for assigning judges to proceedings in a meaningful relationship to the actual caseloads at each agency. Offsetting peaks and valleys in agency needs for hearings by administrative law judges are not now adjusted.

The OPM administered loan program has not solved this prob-

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or program has been added or taken away, the variety of cases heard by the department's judges changes. The administrative law judges at the Department of Labor also hear and decide an equivalently large variety of cases under diverse statutes and regulations. Typical of a number of administrative law judges who have been able to quickly adapt to differing areas of expertise during the course of their judicial careers, the other author of this article has specialized as a member of a board of contract appeals in government procurement law and as an administrative law judge at several agencies where he has decided labor-management, workers' compensation, child-labor, and other cases for the Department of Labor; civil penalty cases for the Federal Mine Safety and Health Review Commission; false advertising cases for the Postal Service; and debarment cases for the Small Business Administration (SBA). The SBA debarment cases were heard pursuant to a loan program administered by the Office of Personnel Management, under which many judges have quickly and successfully adapted to cases of administrative law completely disparate from those they normally hear and decide.

[141] *Hearings on S. 1275*, *supra* note 66, at 173.

lem. Although an excellent theoretical solution, it conflicts with pragmatic agency concerns. The same reason given by many agencies in opposition to the Corps' establishment - lack of agency control - often persuades agencies to assign non-APA protected in-house employees to hearings, where possible, rather than borrowing unknown administrative law judges. More importantly, lending agencies must concede that their judges are underworked, which could imply that they have too many judges, prosecuting attorneys and other personnel, and could result in reductions in appropriated funds and staff.

The establishment of a corps should not increase any of the major costs of maintaining administrative law judges. These costs consist of payroll, physical facilities and travel. The Corps' anticipated consolidation of functions and elimination of duplication should decrease each of these cost components. Merely because the Corps will be a new agency does not mean there will be additional costs. At present, administrative law judges frequently make arrangements through the General Services Administration for the use of hearing room facilities.[142] There would be no change in this practice. The vast majority of administrative law judges are presently located throughout the nation in GSA owned or leased buildings. There would be no reason to move those judges.

The eventual consolidation of administrative law judges located in Washington will decrease costs by reducing the number of square feet required for hearing rooms, libraries, etc. The bill provides for the transfer of support personnel from agencies that now employ administrative law judges. Therefore, the establishment of a corps will not result in the hiring of additional personnel. The employment of modern computers and other equipment by the Corps should eventually reduce the size of its staff.

These anticipated cost savings have been experienced in states which have implemented similar centralized systems of administrative adjudication.[143] Furthermore, as public confidence in the administrative judiciary is increased, appeals to federal courts should decrease with resulting cost savings to both the executive and the judicial branches of the federal government.

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[142] Each United States district court maintains little used courtrooms in cities where it infrequently sits. The United States Tax Court has hearing rooms in most major cities that are frequently idle and available. State and local governments are also generally cooperative. In addition, a special law school training program, participated in by both authors, has been recently developed by the ABA's National Conference of Administrative Law Judges in which agency hearings are conducted before students in law schools' moot court facilities, after which the presiding administrative law judge lectures on the practical aspects of administrative law.

[143] *See supra* notes 74, 75 & 96.

VI. CONCLUSION

Enactment of the Heflin bill would rectify a fundamental conflict between requisites of the Constitution and the present system for employment of federal administrative law judges.

They are presently housed as subordinate employees of agencies which may be motivated to interfere with judicial functions. The most striking example of actual interference is provided by the Social Security Administration. These practices conflict with the Due Process Clause of the Constitution.[144]

It is no answer to these arguments that the agency interferences were in pursuit of honorable ends which the agency sought to implement in the most efficient manner. "Indeed, one might fairly say of the Bill of Rights in general and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy which may characterize praiseworthy government officials."[145]

Eight states have now recognized that the role of the administrative judiciary is inconsistent with their employment by individual regulatory agencies and departments of the executive branch.[146] The use of central panel systems by those states have proven successful and saved money. There is every reason to believe that the federal government would enjoy similar cost savings by establishing its administrative law judges as an independent, unified corps.

Bernard G. Segal, past president of the American Bar Association, perhaps best explained the essential reason why an independent administrative judiciary is needed:

> Consider, for example, the unavoidable appearance of bias when

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[144] A fair trial in a fair tribunal is a basic requirement of due process. Fairness, of course, requires an absence of actual bias in the trial of cases. Our system of law has always endeavored to prevent even the probability of unfairness. The Supreme Court has said that "[e]very procedure which would offer a possible temptation to the average man as a judge. . .not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law." Tumey v. Ohio, 273 U.S. 510, 532 (1927). Such a stringent rule may sometimes bar trial by judges who, having no actual bias, attempt to weigh the scales of justice equally between contending parties. In order to perform its high function in the best way "justice must satisfy the appearance of justice." Offutt v. United States, 348 U.S. 11, 14 (1954); *In re* Murchison, 349 U.S. 133, 136 (1955).

[145] Stanley v. Illinois, 405 U.S. 645, 656 (1972).

[146] *See supra* note 97.

> an administrative law judge, attached to an agency, is presiding in litigation by that agency against a private party. One can fill the pages of the United States Code with legislation intended to guarantee the independence of the administrative law judge; but so long as that judge has offices in the same building as the agency staff, so long as the seal of the agency adorns the bench on which that judge sits, so long as that judge's assignment to the case is by the very agency whose actions or contentions that judge is being called on to review, it is extremely difficult, if not impossible, for that judge to convey the image of being an impartial fact finder.
>
> A truly competent and impartial administrative judiciary is a precious prize indeed. But even more than a prize, such an administrative judiciary is essential if our administrative justice system is to function successfully under the crushing weight of new legislation and new cases and in the fishbowl environment in which all of government finds itself as we embark upon our third century as a nation.[147]

The authors join with Mr. Segal and the many other distinguished members of the bar who favor the corps concept. We believe that enactment of the Heflin bill will assure the fairness of administrative adjudications and result in more efficient employment of administrative law judges with consequental cost savings to the federal government.

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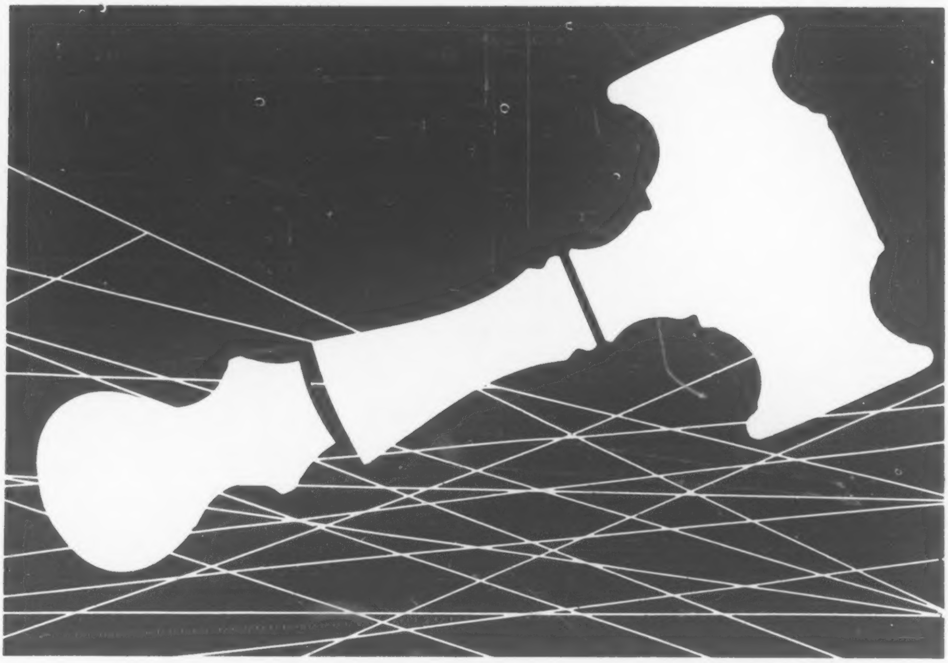
[147] Segal, *The Administrative Law Judge*, 62 A.B.A. J. 1424, 1426, 1428 (1976).

Administrative Law Judges: The Corps Issue



National Conference of
Administrative Law Judges,
Judicial Administration Division,
American Bar Association

ADMINISTRATIVE LAW JUDGES
The Corps Issue

A monograph reviewing proposals to centralize the federal government's employment of administrative law judges for distribution within the American Bar Association and to other organizations concerned with improvement of the administrative process.

Prepared by
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Introduction

The subject of this monograph holds special interest for our conference. We represent the nation's administrative law judges (ALJs) within the American Bar Association's Judicial Administration Division. No topic has fired the imaginations of administrative law judges more than the ALJ Corps Issue. This has been particularly true since 1974 when a special study group under the Civil Service Commission's Deputy General Counsel, Phillip La Macchia, recommended that the federal government could better employ its administrative law judges as a "unified corps," detached and separate from the agencies whose cases they hear and decide. Administrative law judges immediately supported the concept and awaited its implementation. Although eleven states enacted implementing laws and each enthusiastically reported that as a result public confidence has grown stronger, the quality of issued decisions improved, the overall costs decreased and efficiency increased, the federal government failed to act.

In 1982, a special drafting committee was formed by our conference to fashion a model "ALJ Corps" bill for consideration by our members and the bar at large. The draft we produced was circulated to federal ALJs by the Federal Administrative Conference, a sister organization which exclusively represents those of us employed by the federal government. Over 70 percent of the judges polled voted in favor of the bill as drafted.

At the time our group was preparing its model draft, Senator Howell Heflin, former Chief Judge of the state of Alabama, in speeches before various civic organizations, independently called for the creation of a federal "ALJ Corps." Officers of FALJ and another sister organization, the Association of Administrative Law Judges, Inc., which represents those judges who hear cases at the Social Security Administration, presented our draft to Senator Heflin, who modified some of its provisions, and, in 1983, introduced it as the first "ALJ Corps" bill. Similar bills were later introduced in the House, and three hearings were held on the Heflin bill by the Senate Judiciary Committee.

Our conference has taken an active role in explaining the corps concept and the pending bills to the ABA and various bar and civic associations. In the ABA, the Judicial Administration Division, the Litigation Section, TIPS and the General Practice Section have each endorsed the concept and have recommended that implementing legislation should be enacted as soon as possible.

Evaluation of the corps concept and its merits has been hampered, however, by the lack of a concise yet sufficiently detailed written recitation of the factual background of consideration by ABA leaders and other concerned members of the legal community. Judge E. Earl Thomas accepted my commission to undertake the arduous task of synthesizing the various studies, articles and reports on this subject in order to prepare the excellent monograph which follows. As Deputy Chief Judge of the United States Department of Labor, which employs ninety-six administrative law judges and is the second largest employer of ALJs in America, Judge Thomas' comments on the operational advantages and efficiencies that are likely to result from a corps, are particularly instructive.

Victor W. Palmer
Chair
National Conference of Administrative Law Judges

Administrative Law Judges: The Corps Issue

Although the Administrative Procedure Act (APA)[1] is thought of as the beginning of the modern federal administrative hearing process, administrative hearings have occurred since 1789.[2] The APA was enacted in response to growing dissatisfaction with the structure and performance of the adjudicative process. A typical agency hearing is far different today than it was in the early days of the APA. The vast majority of hearings now consists of large numbers of fairly fungible cases which involve private rights rather than proceedings in which the agency has a major stake in a policy-making issue.

The notion that a modern administrative law judge acts merely as an arm of the agency and serves as a depository and filter for record evidence from which commissioners can make a final decision no longer has validity except in a small minority of regulatory cases. Agency "expertise" is invoked more as a shibboleth than a description of the present-day administrative process. Administrative law judges now decide disputes that closely resemble typical Article III court actions and seldom hear the classic agency licensing and rate-making hearing models. Antiquated ideas that for decades have controlled administrative practice and procedure must give way to a more practical and economic system if the public and the Congress are to continue to accept this means of dispute resolution. Calls for reform of the system's structure, focusing primarily on the proposal for a corps of administrative law judges as contained in the Heflin bill,[3] are currently being raised.[4]

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[1] Administrative Procedure Act of 1946, Pub. L. No. 79-404, 60 Stat. 237 (codified as amended at 5 U.S.C. §§ 501–559 (1982)).

[2] *See* 3 DAVIS, ADMINISTRATIVE LAW TREATISE § 17.11 at 313 (2d ed. 1978); *See also* Schwartz, *Administrative Law: The Third Century*, 29 ADMIN. L. REV. 291, 293 (1977).

The Heflin bill remedies a basic incongruity inherent in the present administrative adjudicatory system's structure—the employer-employee relationship of federal agencies and "their" administrative law judges. This relationship, always a source of controversy, has grown even more controversial as the position of the administrative law judge has evolved. Increasingly, administrative law judges are perceived as the functional equivalent of trial judges. Lawyers accustomed to practicing in both the courts and agency administrative hearings tend to recognize no differences between forums. The public perception generally is that a trier of facts presiding as a judge ought to be one. Reflecting this perception, the Civil Service Commission changed the title of the position from "hearing examiner" to "administrative law judge."[5] The United States Supreme Court considered the nature of the administrative law judge's position and declared, "There can be little doubt that the role of the modern federal hearing examiner or administrative law judge . . . is 'functionally comparable to that of a judge.' "[6]

With the emergence of administrative law judges as judges came the need for all administrative law judges to be as free from all special influence as judges. The problem articulated by the APA's legislators as "the fundamental problem of the inconsistent union of prosecuting and deciding functions exercised by many executive agencies,"[7] has grown to be an intolerable flaw in the system. Although some members of the administrative law academic community would further relax the separation of functions principle, practicing lawyers believe many agencies have already gone too far.

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[3] *See Administrative Law Judge Corps Act: Hearings on S. 673 Before the Subcomm.* 99th Cong., 1st Sess. (1985). An earlier version of this bill was proposed during the 98th Congress. S.1275, 98th Cong., 1st Sess. (1983).

[4] *See, e.g.*, Palmer & Bernstein, *Establishing Federal Administrative Law Judges as an Independent Corps: The Heflin Bill*, 6 W. NEW ENG. L. REV. 673 (1984); Joost, *A Corps of Federal Administrative Law Judges: Why? What Kind? Operating How? Under Whose Control?* 19 NEW ENG. L. REV. 695 (1983–1984); *cf.*, Kauper, *Protecting the Independence of Administrative Law Judges: A Model Administrative Law Judge Corps Statute*, 18 J.L. REFORM 537 (1985); DeSeife, *Administrative Law Reform: A Focus on the Administrative Law Judge*, 13 VAL. U.L. REV. 229 (1979).

[5] 5 C.F.R. § 930.203(a)(1977); Pub. L. No. 95-251, 92 Stat. 183, amending 5 U.S.C. § 3105.

[6] Butz v. Economu, 438 U.S. 478, 513 (1978).

The APA, the most extensive reform of the administrative hearing system to date, did much to ameliorate the "fundamental problem," as it then existed.[8] Like the Heflin bill, its central purpose was to sufficiently separate administrative law judges from their agencies so as to ensure requisite judicial independence. It sought to accomplish this by provisions designed to give administrative law judges security in their tenure, promotion and compensation.

The APA provides that: 1) administrative law judges are appointed by the Office of Personnel Management (OPM) in accordance with the Civil Service system for merit appointments;[9] 2) are not supervised by agency personnel performing investigative or prosecutorial functions for the agency;[10] 3) are not subject to the performance appraisals given other Civil Service employees;[11] 4) are paid by OPM, and not in accordance with agency ratings or recommendations;[12] 5) are exempted from agency certification for the periodic step increases in pay they receive;[13] 6) are assigned cases in rotation and cannot be given tasks that are inconsistent with their positions;[14] and 7) can be discharged only for good cause and after a hearing before the Merit Systems Protection Board.[15]

Nevertheless, the APA does not sufficiently protect judicial autonomy. As long as administrative law judges are employees of the agencies that appear before them, their independence is suspect, and the ability of an agency to exert improper influence over them is ever-threatening. The General Comments of the APA indicate that its draftsmen realized that the APA might very well prove insufficient. They stated that there existed a wide divergence of views on how best to separate examiners from employer agencies and "The committee has . . . taken the course which it believes will suffice without being excessive. Moreover, amendatory or supplementary legislation can supply any deficiency which experience discloses in those cases."[16]

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[7] Act of June 11, 1946, Pub. L. No. 79-404, U.S. CODE CONG. & AD. NEWS (Stat.) 189.

[8] Wong Yang Sung v. McGrath, 339 U.S. 33, 41 (1950).

[9] 5 U.S.C. § 3105 (1982).

[10] 5 U.S.C. § 554(d).

[11] 5 U.S.C. § 431 (2)(D)(1982).

[12] 5 U.S.C. § 3105 (Supp. III 1979).

[13] 5 U.S.C. § 5362.

[14] 5 U.S.C. § 3105.

[15] 5 U.S.C. § 7521 (Supp. III 1979).

In the opinion of many commentators, [17] the American Bar Association's Judicial Administration Division and its various conferences, the Litigation Section, the General Practice Section, the Tort and Insurance Practice Section, the Federal Administrative Law Judges Conference, the Association of Administrative Law Judges, Inc., the Federal Bar Association, the Judicial Council of the National Bar Association, the American Medical Association, the American Association of Retired Persons, the American Immigration Trial Lawyers Association, local bar associations[18] and over one hundred thirty co-sponsors of the ALJ Corps bill, the time has come for such supplementary legislation.

Integrity of the Hearing Process

Administrative law judges have been referred to as the "invisible judiciary." This label actually belies their tremendous numbers and the impact of their decisions. The size of the federal administrative judiciary is better appreciated by realizing that there are twice as many federal administrative law judges as there are district court judges handling all federal civil and criminal cases. The number of decisions made by administrative law judges is staggering. The variety of controversies that are subject to the administrative hearing process also indicates the wide range of matters falling within the purview of federal administrative law judges. One commentator summarized some of the matters with which administrative law judges deal as including:

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[16] Act of June 11, 1946, PUB. L. NO. 79-404, U.S. CODE CONG. & AD. NEWS (Stat.) 216.

[17] *See supra* note 4.

[18] *Hearings on S. 673 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. of the Judiciary*, 98th Cong., 1st Sess. (1986) (Statement of Judge Victor W. Palmer) [hereinafter *Hearings on S.673*].

> . . .licensure and route certification of transportation by air, rail, motor vehicle or ship, licensure of radio and television broadcasting; establishment of rates for gas, electrical, communication and transportation services; compliance with federal standards relating to interstate trade, labor-management relations, advertising communications, consumer products, food and drugs, corporate merger and antitrust; regulation of health and safety in mining; transportation and industry; regulation of trading in securities, commodities and futures; adjudication of claims relating to Social Security benefits, workers' compensation, international trade and mining; and many other matters.[19]

Although it is clear that the "invisible judiciary' has considerable impact, the implication of that label, that the public is generally unaware of the office of administrative law judge, still rings true. Moreover, often those who have been directly involved in a proceeding with an administrative law judge appear not to fully comprehend the nature of the administrative law judge's position. The most serious problem and the one with which this monograph and the Heflin bill are most concerned, is the belief that administrative law judges, because they are agency employees, are not impartial, unbiased judges. This attitude is the direct result of the present structure of the administrative hearing system.

The comments of a *pro se* litigant defending himself on charges of Davis-Bacon Act violations made by the United States Department of Labor exemplify the suspicion the public bears toward the "invisible judiciary." He complained, "How can I expect to win this case when the Department of Labor is my accuser, prosecutor and judge?" Such sentiments among litigants appearing before administrative law judges are not rare. The remarks of Winston Borden, President of the Minnesota Association of Commerce and Industry present another example of this perception. In a speech on administrative hearings that he made at Hamline Law School he said, "There is a need in that arena [of administrative hearings] for independence and neutrality both in appearance and in fact. Business simply does not believe that

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19. Lubbers, *Federal Administrative Law Judges: A Focus on Our Invisible Judiciary*, 33 ADMIN. L. REV. 109 (1981).

those hearings are independent and objective today."[20] Such opinions are not only understandable but almost inevitable when the administrative law judge is an employee of the agency and his hearing room and letterhead bear the agency's seal.[21]

Many Article III judges and practicing attorneys perceive administrative law judges as lacking the requisite judicial independence. Judge Aldisert recognized this in his concurring opinion in *NLRB v. Permanent Labor Corp.*[22] when, in reference to administrative law judges, he wrote:

> Many article III judges, as well as scholarly critics and attorneys, consider the federal judiciary's life tenure, employment by a separate branch, and other indicia of independence to be singular assurances of impartial judgment and easily scorn agency "employees" who perform judicial functions without the full investiture of Article III privileges.[23]

The conclusion that, as agency employees, administrative law judges lack independence, seems beyond dispute. Whether agencies actually interfere with the decisional independence of the judges is a matter of debate. But, as the following discussion bears out, it is clear that, on occasion, judicial neutrality of individual administrative law judges has been compromised.

The APA, as noted above, contains many provisions designed to protect the administrative law judge's autonomy. But, as agency employees, administrative law judges are vulnerable to a variety of subtle and not so subtle pressures by the agency. The agency's control over promotional opportunity, office space and support staff is a source of very real power and control over administrative law judges.

Even though most agencies refrain from exerting pressure to influence their judges' decisions, the fact that such pressure may be applied compromises the integrity of the system. Moreover, an administrative law judge might be mindful that a particular position presented for decision is that of the agency which pays the judge's salary. And if a judge is at all ambitious or desirous of becoming a chief judge, the employer-employee relationship and personal reputation within the agency may likewise come to mind when ruling on an agency motion or proposed decision.

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[20] Address by Winston Borden, President, Minnesota Association of Commerce and Industry, at Hamline Law School (Sept. 30, 1983).

[21] See Segal, *The Administrative Law Judge*, 62 A.B.A. J. 1424, 1426 (1976).

[22] 657 F.2d 512 (1981).

[23] *Id.* at 527.

In a study of Social Security Administration (SSA) administrative law judges, conducted by Professor Donna Price Cofer in 1982, 70 percent of the responding judges agreed that "[t]acit agency pressure is placed upon SSA administrative law judges to hand down fewer 'reversals' during times of national government economic retrenchment."[24] This attitude came about after the Secretary of the Department of Health and Human Services (HHS) instituted a program known as "Bellmon Review," which required agency review of the decisions of all administrative law judges who allowed benefits in 70 percent or more of their decisions. The judges were informed of this new procedure by a memorandum from Louis B. Hays, the Associate Commissioner of the SSA Office of Hearings and Appeals, in which he advised, "that if, after further review an administrative law judge's performance had not improved, 'other steps' would be considered."[25]

These undefined and ominous "other steps" appeared to some of the administrative law judges to be a threat that charges seeking adverse personnel action, including dismissal, would be brought before the Merit Systems Protection Board. The Association of Administrative Law Judges, Inc., brought suit to challenge "Bellmon Review," asserting that it compromised the administrative law judge's decisional independence and violated the APA.[26] The court held that the Office of Hearings and Appeals' "ulterior goal [was] to reduce administrative law judge allowance rates," that "administrative law judges could reasonably feel pressure to issue fewer allowance decisions. . . ." and that "as a matter of common sense, that pressure may have intruded upon the fact-finding process and may have influenced some outcomes."[27]

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[24] *Hearings on S.673 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. 338 (1986) (Statement of Donna Price Cofer) *citing* COFER, JUDGES, BUREAUCRATS, AND THE QUESTION OF INDEPENDENCE: A STUDY OF THE SOCIAL SECURITY ADMINISTRATION HEARING PROCESS (Westport, CT: Greenwood Press, 1985).

[25] *See* Association of Administrative Law Judges, Inc. v. Heckler, 594 F. Supp. 1132, 1135 (D. D.C. 1984).

[26] Association of Administrative Law Judges, Inc. v. Heckler.

The court in *Administrative Law Judges, Inc.*, denied the injunctive relief requested because it found that the SSA was no longer engaging in Bellmon Review. The court found, however, that Bellmon Review violated the APA. While it can be argued that the APA would have protected the judges in this scenario and therefore the APA is an adequate safeguard against such interference with judicial independence, much harm occurred in the interim between the onset of Bellmon Review and the court's ruling.

This is borne out by the case of *W.C. Heckler*,[28] in which a class action was brought challenging the Bellmon Review program on the grounds that it had been adopted without the required APA notice and commment procedures under 5 U.S.C. § 553(b), (c) (1982). The *W.C.* court agreed with the conclusion reached by the Senate Subcommittee on Oversight of Government Management of the Committee on Governmental Affairs which found that the "Secretary's focus on allowance rates in the Bellmon Review Program resulted in 'less impartial and fair hearings for some disability claimants. . . .' "[29] Furthermore, the *W.C.* court found that "one of the purposes of the program was to influence future administrative law judge decisions,"[30] and that the notice and comment procedures should have been used. Consequently, the court ordered the Secretary to reinstate the administrative law judge decisions granting benefits to the claimants who made up the class.

These incidents at the SSA demonstrate that the position of administrative law judge is subject to forms of pressure by an agency employer which can compromise the integrity of the administrative hearing process. In a recent editorial appearing in *The Washington Post*, one commentator wrote of how an agency "sets out rules for the . . . industry, enforces them, and then acts as judge in the enforcement actions to which it is a party."[31] And, concluded this writer, "the most primitive concepts of fairness would be offended by such a stacking of the legal deck."[32]

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[27] *Id.* at 1142.

[28] W.C. v. Heckler, 629 F. Supp. 791 (W.D. Wash. 1985).

[29] *Id.* at 800.

[30] *Id.*

Given that the administrative hearing process is a major part of our legal system, we should bring it more in line with the principles of justice upon which our legal system is grounded. On this basis alone, a corps of administrative law judges should be created, but there are other, very practical, benefits to a corps system.

Benefits of an Administrative Law Judge Corps

In this time of Gramm-Rudman-Hollings forced budgetary constraints when legislators are compelled to cut out the fat from every activity of government, the cost savings that will result from the creation of a corps of administrative law judges should be reason enough for Congress to pass an ALJ corps bill. An administrative law judge corps would improve management of the system by eliminating much costly travel, duplicative facilities and staff. More efficient management will not only produce cost savings, but will greatly improve the quality of the current system. Case backlogs will diminish or disappear, administrative law judges will hear a greater variety of cases, and thus be more challenged, and where practical, uniform procedures for cases can be instituted.

Some opponents of the corps have expressed concern that judge expertise in the various specialties of administrative law would be sacrificed upon centralization of ALJs. This argument loses force when one considers that a primary purpose for the corps is to achieve greater efficiency. If true that specialization is more efficient and produces a higher quality product, then the managing judges would seemingly want to retain as much of it as possible. As long as there is a sufficient number of cases in any given program area for which the specialty has been attained, the proposal would maximize use of this specialization. However, at any time judges in a given specialty are idle, for whatever reason, their time could be valuably spent on other cases. The corps would be able to utilize judge time that otherwise would be lost when judges temporarily are out of work. Contrary to popular opinion, unification and specialization are not enemies; both are compatible in a corps.

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[31] Fein, *Get Rid of Regulatory Agencies: They Aren't Independent and They're Unconstitutional,* The Washington Post, July 27, 1986, at D (Outlook) at 5, col. 4.

Federal administrative law judges are currently a fractured group. As of January 27, 1986, a total of 1,034 administrative law judges were employed 29 separate agencies.[33] The vast majority of these judges are employed by the SSA (696), the National Labor Relations Board (NLRB) (94) and the Department of Labor (DOL) (96).[34] The remaining 140 administrative law judges are scattered among 26 agencies.[35] Of these 26 agencies, 20 employ fewer than 10 administrative law judges.[36]

If only the D.C. offices of administrative law judges were brought together under one umbrella organization, tremendous cost savings would result. The pooling of administrative staffs, receptionists, docketing clerks and libraries would allow reduction of the support staff. The consolidation of physical facilities and resources would also result in more efficient and economical operation of the hearing process. For example, instead of twenty-nine separate docketing offices in Washington, D.C., only one would be necessary. At present, both the DOL and the NLRB have computerized docketing systems, each capable of handling the docketing needs for the rest of the agencies.[37] Approximately twenty-eight docketing offices could be eliminated and docketing procedures could be standardized. The many libraries and hearing rooms maintained for the D.C. offices of administrative law judges would also become superfluous.

The experience of the states which have adopted central panel systems illustrates that such consolidation can greatly reduce costs. Ten states have adopted the central panel system for administrative adjudication: [38] California,[39] Colorado,[40] Florida,[41] Massachusetts,[42] Minnesota,[43] Missouri,[44] New Jersey,[45] North Carolina,[46] Tennessee,[47] and Washington.[48] Central panel systems vary from state to state, but all are similar to the Heflin bill's corps proposal in that an independent agency employs administrative law judges to conduct the hearings arising out of other agencies. All of these states report that their central panel systems save both time and money.[49] Opponents of the corps, however, argue that the benefits reaped by the state central panel systems do not automatically translate into the same benefits for the federal administrative system. The federal system is much larger and more spread out than the various state systems, they argue. This is undoubtedly true, but the corps proposal provides for both consolidation *and* decentralization of the federal administrative hearing process. Logically, the savings realized by the states should be even greater in the federal system.

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[33] *Hearings, supra*, note 24 at 181 (Statement of Judge Victor Palmer).

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] Kauper, *Protecting the Independence of Administrative Law Judges: A Model Administrative Law Judge Corps Statute*, 18 U. MICH. J.L. Ref. 537, 547 r.55 (1985).

A large percentage of the 1,034 federal administrative law judges work mainly in Washington, D.C. Some of the larger agencies maintain offices throughout the United States. The DOL, for instance, has seven district offices, and the SSA stations administrative law judges in almost every major city. Nevertheless, many judges must travel as often as one week each month in order to conduct hearings in places remote from both the Nation's Capital and the district offices. To a large extent the federal administrative hearing system radiates from D.C. throughout the United States. Not only is this arrangement costly, given the expense of air fare and hotel accommodations, it is unwieldy for the judges who must travel constantly, and it is cumbersome for the parties.

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[38] Sixteen other states demonstrate an interest in implementing central panel systems: Alabama, Arizona, Georgia, Illinois, Indiana, Maryland, Michigan, Nebraska, New York, North Dakota, Ohio, Oregon, Pennsylvania, South Dakota, Virginia and Wyoming. *See* Appendix to Letter from Duane R. Harves to Victor W. Palmer (Jan. 23, 1986).

[39] CAL. GOV'T CODE §§ 11370, 11502 (Deering 1982).

[40] COLO. REV. STAT. § 24-30-1001 (1982).

[41] FLA. STAT. § 120.65 (1983).

[42] MASS. GEN. L. ANN. ch. 7, §4 H (Michie/Law Co-op. 1984).

[43] MINN. STAT. ANN. § 15.052 (West. Supp. 1984).

[44] N.C. GEN. STAT. § 150 B-23 (Interim Supp. 1986).

[45] N.J. STAT. ANN. § 52:14 F (West Supp. 1984–1985).

[46] MO. ANN. STAT. § 621.015, *et seq.* (Vernon Supp. 1987).

[47] TENN. CODE ANN. § 4-5-120 (Supp. 1984).

[48] WASH. REV. CODE § 34.12 (1983).

[49] Appendix to Letter from Duane R. Harves to Victor W. Palmer (Jan. 23, 1986).

The parties often have difficulties dealing with a geographically distant office. One of the drawbacks is that ministerial matters, often dealt with over the telephone, can run up the expense of the hearing process. The mail delay for filing documents can be substantial, thereby further slowing down an already slow system. And parties are less likely to secure last-minute continuances of the hearing because of the cost involved.

Lawyers are accustomed to practicing in courts with judges constantly in residence. Calendar calls are held to schedule the trial of cases and the calendar is adjusted almost daily to meet the needs of the parties and the court. Judges have the luxury of being able to accommodate the bar's need for flexibility. In federal administrative law hearings many lawyers are surprised to learn that requests for continuances are not automatically granted. When continuances are granted, great waste results. The administrative law judge who grants a continuance during a planned week of hearings allows a gap in his itinerary and this time is lost. Furthermore, the judge must make a return trip to the area to complete the continued case; in addition to the obvious waste, this may lead to considerable delay because the judge will be able to return not simply when the case is ready to be heard, but only when there are also other cases in the area to be heard, to make the trip worthwhile.

Another inconvenience of the current arrangement is that hearing rooms must be secured on a case-by-case basis. While most agencies provide hearing rooms in Washington, D.C., when administrative law judges travel there are few facilities in which to conduct their hearings. Although courtrooms are sometimes donated for an administrative law judge's use, for the most part courts do not want others using their facilities. Furthermore, appropriate facilities are, more often than not, being used. Thus, administrative law judges must occasionally conduct hearings in tiny conference rooms in federal buildings, and more often, hotel rooms.

The restructuring of the system which would occur upon the creation of a corps would ameliorate these problems. More judges would be dispersed throughout the United States. This decentralization would eliminate or decrease the extent of travel that takes place. Furthermore, judges could more often hear cases that arise in their vicinity not only because more judges would be located in outlying areas but also because judges would be able to hear any case requiring a hearing under the APA and not just cases arising out of one agency. Thus, more efficient scheduling would be possible, as would the establishment of permanent hearing rooms. Consequently, the several problems attendant with judges having to "ride the circuit," are remedied.

The corps scheme fosters better case management by allowing case assignments to be based not only on geography but on workload as well. Administrative law judges' caseloads vary greatly depending upon the agency where the judge is employed. Some agencies have a backlog of cases waiting to be heard, pressing their judges with a monotonously steady stream of cases, while other agencies have intermittent caseloads and their judges hear cases only sporadically.

When Congress passed the APA in order to improve the administrative hearing process it undertook to provide for its efficient operation by permitting agencies to loan and borrow judges.[50] Although the loan program has been in effect since the passage of the APA, it is widely recognized that it has not been very effective. Judge Marvin H. Morse, a former director of OPM's loan program, stated:

> The deficiency has been demonstrated over and over again by OPM's inability promptly to fill the demands made on it by borrowing agencies from among those employing agencies willing to make their judges available. . . . OPM as a borrower must *beg* for assistance. . . it begged for help when I managed the program; it was made clear that such is the case today as recently as April 8 of this year [1986] when my successor at OPM, with his staff, met with the chief administrative law judges, and stressed OPM's virtual inability to meet demands.[51]

The reasons behind the loan program's ineffectiveness are of secondary importance to this writing and are more appro-

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50. *See* 5 U.S.C. § 3344.
51. *Hearings on S.673* (Statement of Judge Marvin H. Morse).

priately the subject of another paper. What is important, however, is that this program has been ineffective. It has not imparted the desired flexibility to the present system, nor is it likely to do so in the near future. Consequently, administrative law judges must needlessly contend with a system lacking a mechanism to even out their workload.

The corps would provide the flexibility required to ensure uniform workloads under the Heflin bill. Judges would be grouped in the following divisions: 1) Division of Communications, Public Utility and Transportation Regulation; 2) Division of Safety and Environmental Regulation; 3) Division of Labor; 4) Division of Labor Relations; 5) Division of Health and Benefits Programs; 6) Division of Securities, Commodities, and Trade Regulation; 7) Division of General Programs and Grants.[52] Each of these divisions will be headed by a division chief evenly distributed among the judges. The degree of crossover of judges between divisions has not been determined, but the barriers that currently exist in the loan program will not be present.

Judges will be assigned to these divisions according to the type of cases they previously heard. Under the present system, judges repeatedly hear the same types of cases. They therefore develop a high degree of expertise in the types of cases in which they specialize. In the divisions of the corps, they will hear cases arising from the same area of law, but will hear the full range of such cases instead of cases which only one agency administers. Consequently, the judges will still be specialists, and expertise will not be lost, but they will have more variety in their work.

As mentioned earlier, a principal argument advanced in opposition to the corps is that it will not make maximum use of each judge's expertise. Opponents contend that administrative law judges should continue to preside over the same cases which they have been hearing. Providing a more varied caseload, it is argued, will lead to less expeditious and less accurate resolution of cases.[53]

Two assumptions underlie this conclusion. The first is that the corps would destroy administrative law judge expertise and the second is that this would be a significant detriment to the hearing process. As already noted, the Heflin bill provides for seven divisions of judges within the corps, thereby preserving, in large part, administrative law judge specialization expertise. Thus, the corps would not destroy administrative law judge expertise. However, judges undeniably will have a more varied caseload, and this brings us to the second assumption. It is assumed that broadening the scope of specialization will be detrimental to the quality of decisionmaking because administrative law judges will not readily master the law governing types of cases they have not previously heard. This assumption lacks any factual foundation and is based on a gross misconception of the intellectual abilities and skills of administrative law judges. The selection process for administrative law judges is one of the most rigorous in America in the opinion of most commentators. [54] It should be assumed that administrative law judges, like other judges, are competent to hear cases outside their original expertise. Furthermore, broadening administrative law judge experience should not significantly lessen expertise. At one time California operated a central panel of administrative law judges at the same time many agencies continued to have their own hearing officers. During this period, administrative law judge expertise was reported not to be a "serious problem." [55]

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[52] S.673 99th Cong., 1st Sess. (1985).

[53] *Hearings on S.673* (Statement of Robert J. Cyncar).

Concerns about loss of speed in rendering decisions, on the other hand, are merited. Judges who continuously preside over the litigation of the same handful of issues can, most probably, decide these issues more quickly than judges who have never decided those issues. There are, however, significant drawbacks to such highly repetitive decisionmaking, the elimination of which, when coupled with the gains of the corps previously discussed, far outweigh any loss of speed.

One of those drawbacks is that judges often grow bored. Judges who have participated in the loan program have enthusiastically embraced the new-found variety in their caseload compared to the normal cases which had grown monotonous. One commentator reported that, "In . . . numerous interviews [with hearing examiners] the hearing examiners without exception expressed enthusiasm for the loan program, *principally because of the variety which it provides.*" [56] [Emphasis added.] Judge Paul N. Pfeiffer's first-person account of his experience as a judge who worked at several agencies concludes:

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[54] Mans, *Selecting the "Hidden judiciary": How the Merit Process Works in Choosing Administrative Law Judges (Part I)*, 63 JUDICATURE 60 (Aug. 1979).

[55] Abrams, *Administrative Law Judge Systems: The California View*, 29 ADMIN. L. REV. 487, 500 (1977).

> There is no question that the cross-fertilization of experience at a variety of agencies sharpens the judge's intellect any reduces and tendency to staleness and stagnation which inevitably derives from repeated exposure to similar case types. [57]

The corps concept allows for a varied caseload which combats boredom and perhaps has the added benefit of attracting more members of the bar to pursue the career of administrative law judge.

Another improvement which will follow from the creation of a corps of administrative law judges is the institution of uniform interagency procedures to govern the hearing process.[58] A wide variety of procedural and evidentiary rules are currently used in departmental and agency adjudications. In some instances the Federal Rules of Civil Procedure control; in others, the Federal Rules are to be used for guidance; and sometimes, there is no mention made of any procedural or evidentiary rules to apply. [59] This is a cause of confusion to the practicing bar; and many commentators and legislators have advocated a standardization of interagency procedures. In 1936 the following quote appeared in a report of the ABA Special Committee on Administrative Law:

> The distressing and kaleidoscopic variety in practice and procedure (including rules of evidence) exhibited by federal administrative agencies is notorious. Part of it is due to differences in the statutes under which they function; part is due to the requirements of dissimilar fields of

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[56] Scalia, *The Hearing Examiner Loan Program*, 1971 DUKE L. J. 319, 343.

[57] Pfeiffer, *Hearing Cases Before Several Agencies—Odyssey of an Administrative Law Judge*, 27 ADMIN. L. REV. 217, 230 (1975).

[58] *See* Marquardt and Wheat, *The Developing Concept of an Administrative Court*, 33 ADMIN. L. REV. 301, 308 (1981).

[59] R. Pierce, Use of the Federal Rules of Evidence in Federal Agency Adjudications 1 (November 20, 1985) (Unpublished draft report).

> regulation; more is due solely to the variations in regulations and practices, written and unwritten, which have developed because of the present anarchy, each agency following its own course.[60]

This situation persists today.

These various efficiencies and improvements would be the natural result of the greater cohesion and consolidation inherent in the envisioned corps structure. But the paramount benefit to be realized is that a corps would ensure the decisional independence of administrative law judges which is absolutely necessary for the administrative hearing process to comport with American ideals of fairness and justice.

Historical Background

A summation of the history of efforts to separate administrative law judges from their agencies is necessary to fully understand the impetus behind the Heflin bill. The anomalous combination of judicial, investigative and prosecutorial functions existed in federal agencies from the beginning of the United States government and met with early disapproval.[61] In the 1930s, however, with the "creation and expansion of the New Deal and World War II agencies"[62] and the attendant "intense political conflict over the programs and operations of"[63] these agencies, the debate on this issue heightened dramatically.[64] Since then, this issue has been a

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60. Report of the Special Comm. on Admin. Law, 61 ABA REP. 720, 742 (1936).

61. The 1886 congressional debates on the Interstate Commerce Act concerning the establishment of the Interstate Commerce Commission in 1887 reflect this concern. 24 Stat. 379 (1887).

62. Macy, *The APA and the Hearing Examiner: Products of a Viable Political Society*, 27 FED. B.J. 351, 355 (1967).

63. *Id.* at 355.

64. Some commentators to discuss the administrative decisionmaking process before the topic became so frequently raised include: FRANKFURTER & DAVISONS, CASES AND MATERIALS ON ADMINISTRATIVE LAW V (2d ed. 1935); E. FREUND, CASES ON ADMINISTRATIVE LAW VI (2d ed. 1928); Frankfurter, *The Task of Administrative Law*, 75 U. PA. L. REV. 614 (1927); Hughes, *Some Aspects of the Development of American Law*, 29 N.Y.B.A. REP. 266 (1916); Sutherland, *Private Rights and Government Control*, 42 A.B.A. REP. 197 (1917); Address of President Guthrie, 46 N.Y. B.A. REP. 169 (1923). *See* Palmer, *The Evolving Role of Administrative Law Judges*, 10 NEW ENG. L. REV. 755, 758 & n.27 (1984).

repeated, though somewhat sporadic, topic of debate.

During the 1930s several unsuccessful bills were introduced in Congress to establish an administrative court. Senator George Norris, Chairman of the Senate Committee on the Judiciary, introduced a bill to create a United States Court of Administrative Justice in 1929.[65] It was to have the review jurisdiction over certain administrative decisions and would have amalgamated the Court of Claims, the Court of Customs and Patent Appeals, the jurisdiction of the Circuit Court of Appeals over appeals from claims against the United States, part of the Board of Tax Appeals' jurisdiction, and the District of Columbia courts' jurisdiction over petitions for extraordinary writs against federal government officials.[66]

Starting four years later, Senator Miles M. Logan introduced similar bills in four consecutive Congresses.[67]

At the same time, several study and investigative groups examined the extent and propriety of adjudicative and investigative functions being combined within individual agencies. The American Bar Association's Executive Committee created a Special Committee on Administrative Law in 1933 to study "the practical operation of the various types of administrative machinery."[68] The Committee acknowledged that its topic was a forbiddingly large one with a multitude of issues needing to be studied and it singled out the issue of the judicial integrity of administrative tribunals as one of the most important issues:

> In general, also, such tribunals have encountered their chief criticisms in allegations that they have gone too far in dispensing with basic safeguards, particularly on the quasi-judicial side of their operations. It is in this field that there is the greatest need for intelligent study on the part of the legal profession and for co-operation with legislatures and with administrative officials.[69]

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[65] S.5154, 70th Cong., 2d Sess., 70 Cong. Rec. 1030–33 (1929).

[66] *Id.*

[67] S.1835, 73d Cong., 1st Sess., 77 Cong. Rec. 4962 (1923); S.3787, H.R. 12297, 74th Cong., 2d Sess., 80 Cong. Rec. 782 (1936) (This bill died in committee because no hearings were held on it in either house); 61 A.B.A. Rep. 720, 759 (1936); S.3676, 75th Cong., 3d Sess., 83 Cong. Rec. 3539 (1938); H.R. 6324, H.R. 4235, H.R. 4236, S.916, 76th Cong., 1st Sess. (1941).

[68] Report of the Special Committee on Administrative Law, 58 A.B.A. Rep. 407, 412 (1923).

[69] *Id.* at 411.

Furthermore, the Committee urged members of the ABA to study Senator Logan's bill, then before Congress, to create an appellate administrative court.[70] The Committee's first report came out in 1934. [71] It advocated the creation of a federal administrative court of general jurisdiction while at the same time acknowledging that the reorganization of administrative tribunals into "a federal administrative court represents an ideal rather than something capable of immediate practical realization in all its details." [72] The Committee's proposal was similar to the proposals of Senators Norris and Logan. These proposals, however, were doomed to failure. The ABA refused to sanction the Committee's view partly because of a reluctance to "summarily wipe out all that has been evolved over a period of 50 or more years."[73] Instead the ABA began a push for procedural reform of the hearing process. [74] And attorneys specializing in practice before the Board of Tax Appeals and the Customs Court protested against these proposals which would submerge these tribunals within the Administrative Court. [75]

In the Report of the Special Committee on Administrative Law to the American Bar Association, explanation of the failure of the administrative court proposals is made:

> There developed hostility on the part of members of the Association—particularly those engaged prinicipally in tax, customs or patent law litigation—and in the legal forces of the Government itself to the creation of a large administrative or legislative court, with headquarters at the seat of the government but ambulatory in the discretion of such court to hear and determine these controversies *de novo*. The reasons for the opposition of these several groups varied. . . .[76]

Although these efforts to create an Administrative Court failed, the intermingling of adjudicatory with prosecutorial and investigative functions within the agencies continued to be looked upon with disfavor. In 1936, President Roosevelt appointed a Committee on Administrative Management to conduct a broad study on the "administrative management of the executive branch." [77] The Committee, which issued its report in 1937, recommended a major overhaul of the executive branch's structure. One suggestion proposed to place the more than 100 independent agencies, administrations, authorities, boards and commissions under one or the other of the twelve major executive departments. This grew out of a concern that the President was no longer able to adequately control the policymaking of these bodies. At the same time, however, the Committee believed that the adjudicatory decisionmaking of these bodies should be completely independent of the executive branch's control. Hence, the Committee proposed that each agency, once merged into one of the twelve major executive departments, would be divided into a judicial section and an administrative section. The judicial section "would be wholly independent of the Department and the President with respect to its work and decisions."[78] Although President Roosevelt supported the Committee's proposal, Congress rejected it as too drastic a change to the existing system of administrative law. [79]

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[70] *Id.* at 427.

[71] Report of the Special Committee on Administrative Law, 59 A.B.A. REP. 539 (1934).

[72] *Id.* at 550.

[73] 61 A.B.A. REP. 224 (1936).

[74] 61 A.B.A. REP. 720, 757 (1936).

[75] 62 A.B.A. REP. 260–85 (1937). *See also* Minor, *The Administrative Court: Variations on a Theme*, 19 OHIO ST. L.J. 380 (1958).

[76] 62 A.B.A. REP. 806 (1937).

The idea of isolating the adjudicatory function of the agencies persisted, however. At President Roosevelt's request, the Attorney General appointed a committee in February of 1939 to investigate procedural reform of the administrative process and to suggest needed legislation. The Attorney General's Committee on Administrative Procedure submitted its final report, along with minority statements, in 1941.[80] This comprehensive study yielded numerous recommendations for reform improvement of the administrative legal system. To achieve separation of the agencies' prosecuting and adjudicating functions, the Committee proposed, instead of the creation of an Administrative Court or several specialized courts, isolation of the adjudicatory function within the agency itself to attain integrity within the hearing process.[81] The Attorney General's Committee argued against creating a separate agency for adjudication because it was concerned that this might cause inconsistency in the agencies' policies: promote differing views over the meaning of statutes; lead to a breakdown of responsibility between the agency and its adjudicatory counterpart; encourage more prosecution and discourage negotiations and settlements.

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[77] Reorganization of the Executive Departments, Message from the President of the United States, 15 S. Doc. No. 8, 75th Cong., 1st Sess. 2 (1937).

[78] Report of the President's Committee on Administrative Management, Administration in the Government of the United States, S. Doc. No. 8, 75th Cong., 1st Sess. 69 (1937).

[79] Macy, *supra* note 63 at 355.

[80] Report of the Committee on Administrative Procedure Appointed by the Attorney General, *reprinted in* S. Doc. No. 8, 77th Cong., 1st Sess. (1941).

Three members of the Attorney General's Committee disagreed with the majority on the method of separating prosecuting and judicial functions. [82] The minority argued that such a separation should be complete, especially where a hearing involves a factual dispute between the government and private parties. The minority stood in favor of placing the adjudicatory function in independent agencies.[83] Although delayed by World War II, the majority's recommendations on this subject led to and were adopted in the Administrative Procedure Act in 1946. Had the minority's view prevailed, a structure similar to that proposed by the Heflin bill might be in place today.

After the enactment of the APA, relatively little attention was paid to the issue of separating administrative law judges from their agencies,[84] until the Commission on Organization of the Executive Branch of the Government, "the Hoover Commission," was formed. The Hoover Commission issued two reports on the independent regulatory agencies, one in 1949 and the other in 1955. [85] The first Hoover Commission report made no mention of either a corps of administrative law judges or an Administrative Court. The second Hoover Commission report, however, recommended reinforcement of the existing APA structure by extending internal separation of functions to the agencies themselves as well as to hearing officers and by eliminating exemptions from the internal separation requirement. [86] It is interesting to note that the second Hoover Commission Special Task Force on Legal Services and Procedures had advocated two more far-reaching measures: 1) Judicial functions such as "the imposition of money penalties, the remission or compromise of money penalties, the award of separation and damages, and the issuance of injunctive orders," [87] should be transferred to the courts of general jurisdiction;[88] 2) an Administrative Court with special jurisdiction in trade regulation and taxation should be established. [89] Thus the regulatory functions of certain agencies would be transferred either to existing courts or the Administrative Court.

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[81] *Id.* at 55–66.

[82] *Id.* at 203.

[83] *Id.* at 208.

[84] Following passage of the APA, Senator McCarren did introduce a bill in Congress for the creation of an Administrative Court, but, unsupported by the bar and opposed by the Courts, it died. Minor, *supra* note 76 at 393.

[85] *See* Commission on Organization of the Executive Branch of Government, Report (1949). [First Hoover Commission Report] 81st Cong., 1st Sess., H. Doc. No. 116; Commission on Organization of the Executive Branch of the Government, Report (1955) [Second Hoover Commission Report], 84th Cong., 1st Sess., H. Doc. No. 128 (1955).

In 1954 and 1955, bills reflecting the Hoover Commission's recommendations were introduced in Congress. In 1957 Senator Smith of New Jersey introduced a bill at former President Hoover's request, which would have created an Article III court of original jurisdiction with Tax, Labor and Trade Sections. [90]

In 1956, the ABA came out in favor of one or more courts of special jurisdiction, asserting that the "internal separation of functions within the agencies achieved by the Administrative Procedure Act is a noble but entirely impractical dream."[91]

During the Kennedy and Johnson administrations, a number of studies touching on this topic were conducted.[92] None, however, were directly concerned with the injustice of combining adjudicatory, prosecutory and investigative functions within the agencies. For example, the Ash Council proposed the establishment of an Administrative Court, but for different reasons arising out of its direction to:

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[86] Recommendation No. 37.

[87] Task Force Recommendation No. 63 at 242.

[88] *Id.*

[89] *Id.* at 246-56, Recommendation Nos. 63, 64 and 65.

[90] S.2292, 85th Cong. 1st Sess. (1957) 103 Cong. Rec. 8155-8157 (1957).

[91] PRETTYMAN, TRIAL BY AGENCY 52 (1959).

[92] LANDIS, REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT (1960). *See also* The President's Advisory Council on Executive Organization, A New Regulatory Framework: Report on Selected Independent Regulatory Agencies 1971 [Ash Council Report].

> . . .consider the totality of the executive organization, the independent agencies, the departments, the other committees and commissions that in turn are all part of carrying on the executive functions of the Government and to particularly recommend those ways in which, through organizational change, the effectiveness of these Government agencies and departments might be improved.[93]

The Ash Council's proposal for an Administrative Court, in contrast to the proposals espoused by the ABA and the Hoover Commission, [94] was concerned with the health of the judicial systems in general. The Ash Council recognized that the federal courts were overburdened and getting more so each year. [95] They sought, through the creation of an Administrative Court, to relieve the federal courts of most administrative decisions and foster "the development of a uniform body of substantive and procedural administrative law." [96] This Administrative Court was to exercise judicial review, thereby relieving the federal courts of appeals from the burden of reviewing decisions of the transportation, securities and power agencies. [97] Also in contrast to most of the prior proposals, it was not to be a trial court. No interest in separating functions was present in this scheme. The agencies would have still exercised all of their combined functions. The only change would have been that an appellate administrative court, instead of the Article III courts, would have reviewed agency action.

The next significant proposal to separate the agencies' functions came in 1974 when a study group directed by Philip LaMacchia, the Deputy General Counsel of the Civil Service Commission, submitted a report recommending the creation of a unified corps of administrative law judges. [98] The Office of Personnel Management, however, did not act upon the report's recommendations. [99]

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[93] Ash Council Report at 123.

[94] Nathanson, *The Administrative Court Proposal,* 57 VA. L. REV. 996, 1003 (1971).

[95] Ash Council Report at 53.

[96] *Id.* at 54.

[97] *Id.*

In 1977, an Administrative Court was proposed again. President Ford had directed Solicitor General Robert H. Bork to study the needs of the federal judiciary system. The Bork Committee report, again reflecting a concern for the overloaded federal courts, put forth proposals designed to relieve the federal courts by: 1) abolishing diversity jurisdiction; and 2) creating new tribunals to assume the judicial business stemming from the regulatory and entitlement programs. [100] The tribunals, composed of administrative law judges, would be independent of the agencies and would not specialize in work coming from a particular agency. [101] There would be a trial division to handle appeals from agency decisions, which is the same function that administrative law judges presently perform. [102] There would also be an Article I appellate tribunal to review appeals from the trial division. [103] There would be no appeal to Article III courts unless a significant point of federal statutory or constitutional law were raised. [104]

The latest effort to form a corps of administrative law judges grew out of the efforts of the National Conference of Administrative Law Judges, Judicial Administration Division of the ABA. The National Conference of Administrative Law Judges formed a committee to draft a working blueprint on a unified corps of administrative law judges. What emerged bore great similarity to the Heflin bill; in fact it was the model for the Heflin bill. The Committee presented the proposal to the

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98. UNITED STATES CIVIL SERVICE COMMISSION, REPORT OF THE COMMISSION ON THE STUDY OF THE UTILIZATION OF ADMINISTRATIVE LAW JUDGES 46 (1974).

99. See Palmer, *The Evolving Role of Administrative Law Judges*, 19 NEW ENG. L. REV. 755, 775 (1984).

100. State of the Judiciary and Access to Justice Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice Committee on the Judiciary H.R. 95th Cong., 1st Sess. (1977) p.243.

101. *Id.* at 244.

102. *Id.*

103. *Id.*

104. *Id.*

Executive Committee of the National Conference of Administrative Law Judges, at the ABA's annual meeting in August 1982, and the proposal was "overwhelmingly approved." [105] Later in February 1983, the Council of the ABA's Judicial Administration Division approved it unanimously. Then in May 1982, Senator Heflin introduced a bill, derived from this Committee's proposals for the creation of a unified corps of administrative law judges. [106]

Various groups and individuals have championed some version of the corps proposal over the years. The improvements that the creation of a corps of administrative law judges would bring to the hearing process are undeniable, and consequently, it is hoped that the corps of administrative law judges will not forever remain simply an idea.

No doubt as support for the Heflin bill continues to mount, opposition will likewise increase. Agency heads fear a loss of control, or prestige, or both, and some advocates of the current system will argue that if the hearing process is to be removed from the agencies, then there is no reason to have administrative law judges. Just let the cases go to the courts for trial. Naturally this argument, made so often in the past, will serve only to stall progress toward a reasonable solution.

It is hoped that the leaders of the bar who have given so much in the past to the development of the field of administrative law will see the corps proposal not as a device for its destruction, but rather as a needed change which will strengthen the administrative process to better serve the public. Their constructive support could prevent the delay of this much needed reform.

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[105] Levant, *A Unified Corps of Administrative Law Judges—The Transition From a Concept to an Eventual Reality*, 6 W. New Eng. L. Rev. 705, 706 (1984).

[106] S. 1275, 98th Cong., 1st Sess. (1983).

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Bureaucratic efficiency vs. bureaucratic justice: administrative law judges in the Social Security Administration

Although Social Security ALJs are protected from political incursions into the hearing process by the Administrative Procedure Act, bureaucratic reorganization now underway has the potential to affect the quality of decisions.

by Donna Price Cofer

To summarize, the process of gaining management control and thereby avoiding inappropriate discretionary judgments by subordinates requires choices that eliminate possibilities for exercises of discretion that would have been (could they have been effectively monitored) considered appropriate—perhaps even wise. The system of control thus demands that some cases be decided irrationally. Moreover, because the system can be monitored only in terms of its own "objective" redefinition of reality—the existence of specified types of data in a case file—it is not possible to know how many irrational decisions are being made.[1]

In this insightful statement, Professor Jerry Mashaw instructs us that management controls of bureaucratic organizations naturally exclude discretionary judgments which may lead to rational choices and that monitoring of bureaucracies excludes knowledge of how many irrational decisions are actually produced. If this is so, the positioning of judges in such a setting conjures up images of inevitable tension in which adjudicators pledged to making impartial decisions are pitted against a bureaucratic framework motivated by control.

Can judges be placed in an organizational setting responsive to political whim and remain loyal to their pledge of neutrality? Will the exclusion of discretionary judgments by subordinates allow bureaucratic managers to become obsessed with the quantity of determinations as opposed to the quality of decisions? This argument has raged within the Office of Hearings and Appeals (OHA), which houses the administrative law judges (ALJs) of the Social Security Administration, for over ten years and is the theme of this article.[2] Emphasis will be placed upon current OHA hearing office reorganization which aptly symbolizes the quality-quantity dichotomy.

OHA operations and history

Since the mid-1950s, the Social Security Administration has been responsible for the distribution of money from the disability trust fund to eligible claimants. Because of the complexities of determining physical and/or mental disability, a hierarchical determination process has been created whereby a State Disability Determination Service first reviews disability claims. If a claimant is denied at the state level, he or she may ask for a *de novo* hearing before an administrative law judge who will review the case file developed by the state, order further development including additional medical reports, and preside over the hearing. The ALJ is responsible for seeing that the rationale for the state denial of the claim and the bases for the assertion of eligibility are fully explored and placed into the hearing record.

Ideally, all the claims considered by the ALJ will be close enough to the statutory definition of disability to warrant a level of subjective human judgment. Often, because the ALJ has the advantage of demeanor evidence because the claimant appears at the hearing, he or she can make a sounder decision than was issued at the state level. The ALJ renders a decision which is reviewable by the Social Security Appeals Council only if the claimant appeals a denial from the hearing or the Appeals Council exercises own-motion review. The basis for own-motion review must be to decide if the ALJ decision constituted an abuse of discretion, was based on either an error of law or unsubstantial evidence to justify the findings and conclusions of law, or presented a broad policy or procedural issue affecting the public interest.[3]

Importantly, the administrative law judge is statutorily protected from political incursions into the hearing process by the Administrative Procedure Act (APA) of 1946.[4] Congress sought to separate the prosecutorial and adjudicatory functions of the administrative agencies within the federal bureaucracy to assure impartial determinations of individual cases. The APA provided that the salary, promotion, and tenure of federal hearing examiners (after 1972, called administrative law judges) would be controlled through merit selection by the Civil Service Commission (since 1978, the Office of Personnel Management). Further, ALJs are not subject to a probationary period nor performance evaluations. ALJs may be removed from their positions only for cause as defined by the Merit Systems Protection Board. The ruling of the Social Security Administration ALJ is the final decision of the agency unless found reviewable by the SSA Appeals Council, whose members are not subject to APA protection. Even though the courts have interpreted the APA to afford ALJs housed in individual agencies adjudicatory independence from administrative interference,[5] the location of ALJs within such a politically-sensitive bureaucratic organization as SSA has created continual challenges to their impartiality.

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[1] Mashaw, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS 179-80 (New Haven, CT: Yale University Press, 1983).

[2] For more background, see Cofer, *The question of independence continues: administrative law judges within the Social Security Administration*, 69 JUDICATURE 228 (1986).

[3] 20 C.F.R. §404.947(a).

[4] 5 U.S.C. §551 *et seq.* (1946).

[5] NLRB v. Donnelly Garment Company, 330 U.S. 219 (1947); Wong Yang Sung v. McGrath, 339 U.S. 33 (1950); Universal Camera Corporation v. NLRB, 340 U.S. 74 (1951); Ramspeck v. Federal Trial Examiners' Conference, 345 U.S. 128 (1953); NLRB v. James Thompson and Company, Inc., 208 F.2d 743 (D.C. Cir. 1953); Cinderella Career and Finishing Schools, Inc. v. FTC, 425 F.2d 583 (D.C. Cir. 1970); Nash v. Califano, 613 F.2d 10 (2nd Cir. 1980); Association of Administrative Law Judges, Inc. v. Heckler, et al., 594 F.Supp. 1132 (D.D.C. 1984).

Because of the impossibility of statutorily defining disability and because of the shifts in political mood regarding the generosity of the disbursement of disability funds, SSA ALJs have found themselves under a threatening pendulum for many years. In the mid-1970s, the new Director of the Office (then-Bureau) of Hearings and Appeals, Robert Trachtenberg, responded to a spiraling caseload by initiating productivity "goals" for ALJs as well as intra-agency review of the "accuracy" of ALJ determinations. Allowances were especially reviewable since they had been shown to be more susceptible to error than denials.[6] These management controls resulted in the filing of a lawsuit against OHA by several ALJs which was later settled without trial.[7]

In the early months of the Reagan Administration, Louis Hays became the Associate Commissioner of OHA and began implementing the Disability Amendments of 1980.[8] Congress had provided for a review of all state disability allowances prior to the actual granting of benefits and for state review of all persons then receiving disability benefits as to the legitimacy of their continuing claim of eligibility. These were known as the "cessation" reviews.[9] The Amendments also required a sample review of all ALJ allowances because of their assumed linkage with error and because of the variance in allowance rates among ALJs. The Hays regime also increased the pressures for higher productivity as the caseload rose. As a result, several ALJs were charged with cause for removal before the Merit Systems Protection Board of the Office of Personnel Management. The central allegation against them was low productivity.[10]

ALJs found themselves reviewing larger and larger numbers of claims denied by the states.

The Association of Administrative Law Judges[11] interpreted the review of selected ALJs with "high" allowance rates to be a threat to their adjudicatory independence. ALJs found themselves reviewing larger and larger numbers of claims denied by the states in which no medical improvement of the original disabling condition was demonstrated and yet, ironically, the ALJs themselves were subjected to a perilous review if their allowance rates became too high. These management controls led to the filing of a lawsuit by the ALJ Association to secure relief from these political pressures.[12] The resulting decision confirmed the ALJs' allegations that such pressures existed and were in contradiction to the APA dictates. However, the judge failed to perceive the inevitable continuation of similar bureaucratic management controls and ruled that the newest OHA management was not guilty of these abuses.

Current directives

The Social Security Administration is currently beginning to administer the Social Security Disability Benefits Reform Act[13] passed in October 1984. The primary purpose of this legislation is to undo the unjustifiable denials of benefits under the "cessation" reviews by ordering new determinations of cases in which no medical improvement was shown. Consequently, the Office of Hearings and Appeals is currently faced with an upsurge in caseload. The OHA management, which the *Association* trial judge exonerated of placing political pressures upon the ALJs, began its administration when Frank V. Smith III was appointed Associate Commissioner in May 1984. Commissioner Smith's earliest months were free of caseload pressures but, with the impending avalanche of new reviews, he began to implement several efficiency measures to prepare the OHA hearing offices throughout the country to process these claims in a timely manner. These initiatives included management controls encouraging the meeting of production goals, greater "consistency" among ALJ determinations, hearing office employee collective goal setting and planning, and the reorganization of hearing offices to expedite the processing of claims.

Only a few weeks after Smith assumed his position, the employees of Region IX in OHA received a memo from their Regional Chief ALJ Stanley S. Sadur that listed the 19 hearing offices of that region with the average monthly ALJ disposition rate of each. The regional employees were advised as follows: "In a photo finish, the winner of the Production Award (Stanley Cup) for the period January-June 1984, is FRESNO with an average monthly ALJ disposition rate of 47.75." The memo continued as follows: "Considering the fact that we will be using other factors aside from production, e.g., case processing times and reduction of aged cases,[14] the ultimate winner of the July-December award will be the office with the best overall statistics."

Frank Smith distributed his own memo calling for productivity goals in November 1984 in which he advised the hearing offices of the "minimum time needed to process an average case through the system" and the average number of cases an ALJ should have "in the pipeline to keep work flowing through the system." In the next month, Smith asserted the OHA objective of improving "the quality, consistency and accuracy of hearings and appeals decisions" and his desire "to effectively communicate goals, performance expectations and performace feedback to all employees."[15] Obviously, productivity and accuracy of decisions were concerns of the OHA Commissioner as they would be to any capable public manager.

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[6] Report by Assistant Bureau Director for Administration, John L. Poore, September 15, 1977.

[7] Bono et al. v. U.S. Social Security Administration, et al., No. 77-0819-CV-W-4 (W.D. Mo. 1979).

[8] Pub. L. No. 96-265, 94 Stat. 441 (1980).

[9] Margaret M. Heckler, Secretary of the U.S. Department of Health and Human Services, announced a moratorium on "cessation" reviews in a nationally televised public announcement on April 13, 1984, charging that the disability determination process was in "disarray" due to its loss of credibility in the eyes of Congress and the American public.

[10] SSA v. Goodman, MSPB No. HQ75218210015; SSA v. Brennan, MSPB No. HQ75218210010; SSA v. Balaban, MSPB No. HQ75218210014.

[11] An incorporated professional association of administrative law judges within the Social Security Administration, representing approximately 300 of the 750 SSA ALJs.

[12] Association of Administrative Law Judges, Inc. v. Heckler, et al., *supra* n. 5.

[13] Pub. L. No. 98-460, 98 Stat. 1794 (1984).

[14] Cases which have been filed with OHA 365 days or longer.

In an attempt to encourage all hearing office personnel (including hearing clerks, hearing assistants, and staff attorneys) to participate in establishing work goals for their offices, the Commissioner created a program labeled "Pursuing Excellence through Participation" or PEP.[16] This initiative caused worry among some ALJs that hearing office personnel may establish production goals for themselves which essentially place the ALJs under the same constraints.[17] Consequently, support staff may become polarized from the ALJs.

Hearing office reorganization

The traditional hearing office organization against which newer systems have been tried is known as the "unit" system. Each ALJ is assigned a staff attorney, hearing assistant, and a hearing clerk. The hearing clerk performs secretarial tasks while the hearing assistant aids the ALJ in case development, scheduling and organizing the hearing, and accompanies the ALJ to the hearing to record the testimony. The staff attorney, or legal analyst, in the unit conducts legal research as requested by the ALJ and other case development as well as drafting the hearing decision. Each support staff member in a unit works exclusively for a single ALJ, and the ALJ is responsible for recommending periodic performance appraisals for each unit member to the Administrative Law Judge in Charge (ALJIC)[18] for that hearing office. While under previous OHA administrators, the "unit" system was only questioned as an inefficient organizational structure, the "unit" is now subject to elimination.

Previously the "unit" system was only questioned as an inefficient structure; it is now subject to elimination.

In conjunction with his other efficiency innovations, Commissioner Smith resurrected a concept of hearing office reorganization which has now been implemented in varying degrees throughout the country. This is not a new idea but rather can claim roots back to the directorship of Robert Trachtenberg ten years ago. In 1975, Trachtenberg proposed a voluntary "Model Hearing Office Concept" to remove the ALJs from administrative functions such as case development tasks. All administrative and clerical personnel within a hearing office were to be pooled with the ALJIC, a newly-created Hearing Administrator, and a staff attorney serving as the control point in preparing cases for hearing. Although the system was never implemented, this concept planted the seeds for future change.

The Louis Hays OHA administration termed its hearing office reorganization "reconfiguration." It removed the ALJs from overseeing the development of evidence, preparing the case for hearing, scheduling the hearing, and drafting the proposed decision. These functions were performed by work pools composed of staff attorneys or hearing analysts and clerical staff. The reconfiguration experiment was conducted only in selected offices which had volunteered for the reorganization. The ALJ Association expressed concern that the ALJ had been separated from case development and yet would be held accountable for the final product.[19]

Hearing office reorganization is currently named FOOS (Field Office Organizational Structure) or "team functioning."[20] It bears a striking resemblance to "pooling" and "reconfiguration," but is dissimilar in the sense that its implementation is not voluntary. In a December 1985 memo, Commissioner Smith informed OHA employees that current projections call for a 20 per cent increase in cases for FY 1986, and that FY 1987 will see a 35 per cent increase over FY 1985. FY 1987 will be the first full year for reviews of "cessation" cases. One of the ways in which Smith hoped to make the hearing offices more efficient in responding to the increased caseload was through the pooling of support staff. In a January 1985 letter to the ALJ Association President, Commissioner Smith advised that "hearing offices should be organized to permit maximum functional teaming of resources—either total teaming of support staff and decision writers or functional teaming with no more than one support staff employee assigned to each individual ALJ." Therefore, some flexibility is allowed to individual hearing offices as to the degree of team functioning which will be implemented.

The responsibility for choosing a hearing office's organization rests initially with the Administrative Law Judge in Charge. However, if the ALJIC does not choose complete or partial pooling of hearing office support staff, he or she must submit a report justifying the hearing office's exemption from reorganization. In an October 1985 memo to the Regional Chief ALJ in Philadelphia, Commissioner Smith indicated that a hearing office would be exempted from pooling support staff "...if its alternative organizational structure provided for fair and uniform treatment of employees and high quality, cost-effective service to the public." To make this determination, hearing offices were ranked for calendar years 1983 and 1984 by the following factors: (1) production per ALJ, (2) average processing time, (3) aged cases as a per cent of pending cases, and (4) cost per case. Exemption would generally be allowed if a hearing office "ranked among the top 50 per cent of hearing offices nationally in at least three out of four of these categories in both calendar years...." However, several other factors could be weighed into the final decision such as higher management recommendations, a hearing office's "grievance and award history," and a hearing office's "progress" from calendar year 1983 to 1984.

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[15] Memo, "OHA Goals and Objectives," from Associate Commissioner OHA to OHA Central Office Executive Staff and Regional Chief ALJs, December 21, 1984.

[16] Memo, "PEP Background Information and Materials," from Project Director, Pursuing Excellence through Participation (PEP) to Frank R. Wilbourne, Acting Associate Commissioner OHA, April 9, 1984.

[17] NEWSLETTER, Association of Administrative Law Judges, Inc., No. 11, October 1984, p. 7.

[18] The ALJIC is chosen by OHA management to operate as the administrative head of a hearing office.

[19] General Accounting Office report, "Social Security Administration Policies For Managing Its Administrative Law Judges, from GAO Director Gregory J. Ahart to U.S. Senator Max Baucus, June 2, 1981.

[20] To date, this program has been continued by Frank Smith's successor (and predecessor), Frank Wilbourne, who again became Acting OHA Commissioner in November 1986.

OHA management controls regarding hearing office reorganization rest upon the quantification of certain factors affecting the processing of disability claims as well as some rather subjective judgments as to the worth of a hearing office's operation. However, to date, ALJs have not been provided a comprehensive listing of OHA hearing offices demonstrating the comparable efficiency levels between "pooled" and "unit" offices. Some of the data which have been released indicate case dispositions by ALJs at the same level or in some cases higher in "unit" offices.[21] In one instance, OHA management decided to order the pooling of support staff in a hearing office not because of low disposition levels but, rather, because the office had the potential for being even more productive.[22] In 1984 and 1985, OHA Region I was commended by OHA management for having the highest accuracy rate in its decisions of any region in the nation.[23] Region I was also commended for reducing its pending aged cases by 72 per cent.[24] However, in 1985, the largest hearing office in Region I was found not to qualify technically for an exemption from pooling because of its "poor performance record" based upon case disposition rate, average cost per case, and average processing time.[25] Interestingly, such inconsistencies and resulting ALJ resistance caused Commissioner Smith to place a moratorium on involuntary hearing office reorganization in Fall 1984,[26] but the moratorium was lifted in early 1985.

There is substantial doubt that pooled hearing offices are more efficient than unit offices.

Some of the major variables used to assess the eligibility of a hearing office for the pooling of its support staff are overall statistics on processing time, average age of cases pending, percentage of aged cases, and percentage of hearings held as related to hearings scheduled. There are numerous factors which influence such "delays," including (1) the time lapse between the date of the claimant's hearing request form and receipt of the file in the hearing office; (2) the time required to secure medical records; (3) time consumed by continuances requested by a claimant or an attorney and mandated by Regulation; (4) time lost when the claimant cannot appear at a hearing prior to or after the first notice of hearing; (5) time expended after a hearing at the request of the attorney to submit additional documents or a brief; and (6) time lost on cases awaiting hearing by an ALJ assigned to work temporarily in a hearing office other than his or her home office.[27]

All these factors constitute either situations beyond the control of the ALJ or instances in which the ALJ must make a judgment to spend more time in order to guarantee that the case is fully developed. Under either circumstance, OHA management uses the additional time expended to evaluate the hearing office as inefficient and thus subject to reorganization rather than attempting to devise a more realistic evaluation of disposition delay and its causes.

From Robert Trachtenberg's "pooling," through Louis Hays' "reconfiguration," to Frank Smith's "team functioning," the ALJ Association has opposed such measures essentially for the following reasons:

- The pooling of support staff removes the staff members from performance review by the ALJ and, consequently, the quality of staff work is lowered.
- Pooled hearing offices are not more productive than unit hearing offices, especially if the quality of the decisions is considered.
- Case development cannot be as efficiently supervised by the ALJ if support staff is pooled.
- The pooling of support staff has created unnecessary management personnel in the hearing offices.

With the pooling of support staff, the ALJ finds that he or she must communicate a need for assistance to a lead hearing assistant, a lead hearing clerk, and a lead decision writer (who may not be a staff attorney).[28] The lead person acts as a liaison between the ALJ and any number of assistants, clerks, and decision writers who may work on a single case file. The lead person will evaluate the performance of a pooled hearing clerk and hearing assistant employees and will be evaluated him or herself by the Hearing Office Manager. The Chief ALJ of the hearing office will evaluate the Hearing Office Manager and the lead decision writer.

There is substantial doubt that pooled hearing offices are more efficient than

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[21] If the lead decision writer is not a staff attorney, he or she will possess less expertise for required legal research and writing and will not enjoy the protection of the ethical mandates of the American Bar Association.

[22] QUARTERLY STATISTICAL SUMMARY, Region III, 1st Quarter, FY 1984 showed reconfigured hearing offices averaging 33.3 dispositions per ALJ while non-reconfigured hearing offices averaged 35.2 per ALJ.

[23] Memo, "Survey of Wilkes-Barre Hearing Office," from Director, Office of Field Administration to Regional Chief ALJ—Philadelphia, July 25, 1985.

[24] Memoranda, "OHA Report on Quality Review," from Regional Chief ALJ—Region I to all ALJs, Staff Attorneys and Hearing Office Managers—Region I, November 20, 1984; April 26, 1985; June 7, 1985.

[25] Memo, "Reduction of Aged Cases," from Regional Chief ALJ—Region I to all Hearing Office Support Staff—Region I, December 14, 1984.

[26] Note, "FOOS Exemption Request—Boston," to Office Chief ALJ from Matt Trocheck, July 23, 1985.

[27] Letter from Frank V. Smith III, Associate Commissioner OHA, to U.S. Senator Thad Cochran, September 21, 1984.

[28] Memo, "Statistics," from F. J. O'Byrne, Hearing Office Chief ALJ—Chicago (South), to Frank Smith III, Associate Commissioner, February 4, 1986.

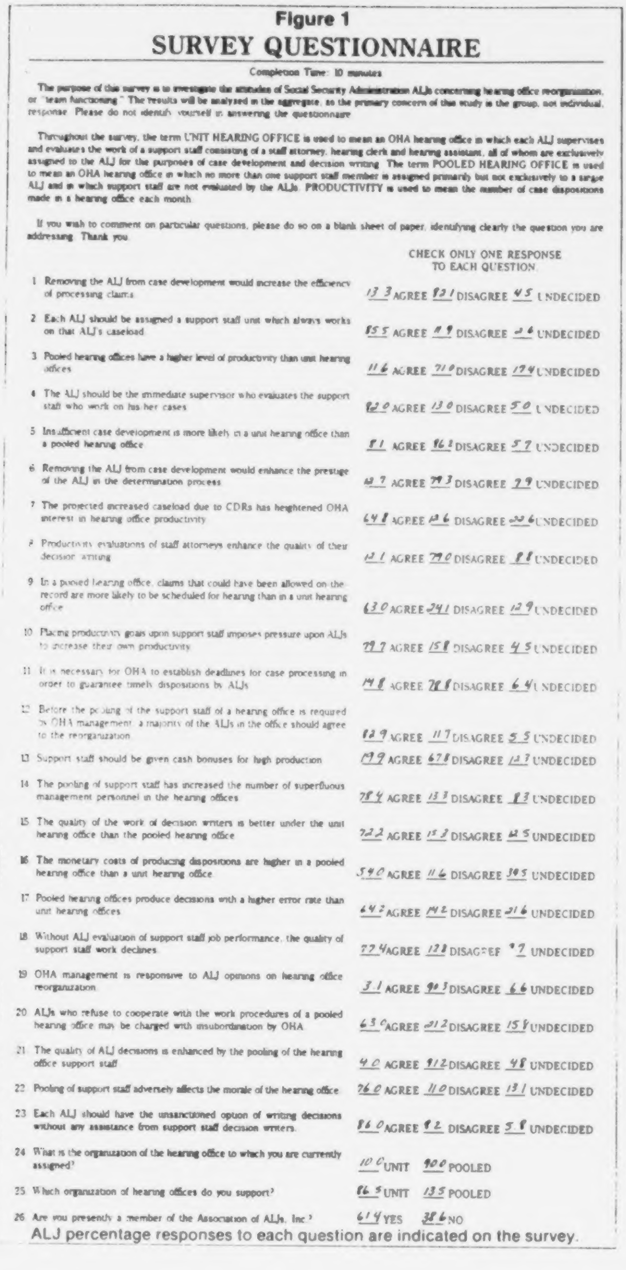

Figure 1

SURVEY QUESTIONNAIRE

Completion Time: 10 minutes

The purpose of this survey is to investigate the attitudes of Social Security Administration ALJs concerning hearing office reorganization, or "team functioning." The results will be analysed in the aggregate, as the primary concern of this study is the group, not individual, response. Please do not identify yourself in answering the questionnaire.

Throughout the survey, the term UNIT HEARING OFFICE is used to mean an OHA hearing office in which each ALJ supervises and evaluates the work of a support staff consisting of a staff attorney, hearing clerk and hearing assistant, all of whom are exclusively assigned to the ALJ for the purposes of case development and decision writing. The term POOLED HEARING OFFICE is used to mean an OHA hearing office in which no more than one support staff member is assigned primarily but not exclusively to a single ALJ and in which support staff are not evaluated by the ALJs. PRODUCTIVITY is used to mean the number of case dispositions made in a hearing office each month.

If you wish to comment on particular questions, please do so on a blank sheet of paper, identifying clearly the question you are addressing. Thank you.

		CHECK ONLY ONE RESPONSE TO EACH QUESTION
1	Removing the ALJ from case development would increase the efficiency of processing claims	13.3 AGREE 82.1 DISAGREE 4.5 UNDECIDED
2	Each ALJ should be assigned a support staff unit which always works on that ALJ's caseload	85.5 AGREE 8.9 DISAGREE 5.6 UNDECIDED
3	Pooled hearing offices have a higher level of productivity than unit hearing offices	11.6 AGREE 71.0 DISAGREE 17.4 UNDECIDED
4	The ALJ should be the immediate supervisor who evaluates the support staff who work on his/her cases	82.0 AGREE 13.0 DISAGREE 5.0 UNDECIDED
5	Insufficient case development is more likely in a unit hearing office than a pooled hearing office	8.1 AGREE 86.2 DISAGREE 5.7 UNDECIDED
6	Removing the ALJ from case development would enhance the prestige of the ALJ in the determination process	12.7 AGREE 79.3 DISAGREE 7.9 UNDECIDED
7	The projected increased caseload due to CDRs has heightened OHA interest in hearing office productivity	64.8 AGREE 12.6 DISAGREE 22.6 UNDECIDED
8	Productivity evaluations of staff attorneys enhance the quality of their decision writing	12.1 AGREE 79.0 DISAGREE 8.8 UNDECIDED
9	In a pooled hearing office, claims that could have been allowed on the record are more likely to be scheduled for hearing than in a unit hearing office	63.0 AGREE 24.1 DISAGREE 12.9 UNDECIDED
10	Placing productivity goals upon support staff imposes pressure upon ALJs to increase their own productivity	79.7 AGREE 15.8 DISAGREE 4.5 UNDECIDED
11	It is necessary for OHA to establish deadlines for case processing in order to guarantee timely dispositions by ALJs	14.8 AGREE 78.8 DISAGREE 6.4 UNDECIDED
12	Before the pooling of the support staff of a hearing office is required by OHA management, a majority of the ALJs in the office should agree to the reorganization	82.9 AGREE 11.7 DISAGREE 5.5 UNDECIDED
13	Support staff should be given cash bonuses for high production	19.9 AGREE 67.8 DISAGREE 12.3 UNDECIDED
14	The pooling of support staff has increased the number of superfluous management personnel in the hearing offices	78.4 AGREE 13.3 DISAGREE 8.3 UNDECIDED
15	The quality of the work of decision writers is better under the unit hearing office than the pooled hearing office	72.2 AGREE 15.3 DISAGREE 12.5 UNDECIDED
16	The monetary costs of producing dispositions are higher in a pooled hearing office than a unit hearing office	54.0 AGREE 11.6 DISAGREE 34.5 UNDECIDED
17	Pooled hearing offices produce decisions with a higher error rate than unit hearing offices	64.2 AGREE 14.2 DISAGREE 21.6 UNDECIDED
18	Without ALJ evaluation of support staff job performance, the quality of support staff work declines	77.4 AGREE 12.8 DISAGREE 9.7 UNDECIDED
19	OHA management is responsive to ALJ opinions on hearing office reorganization	3.1 AGREE 90.3 DISAGREE 6.6 UNDECIDED
20	ALJs who refuse to cooperate with the work procedures of a pooled hearing office may be charged with insubordination by OHA	63.0 AGREE 21.2 DISAGREE 15.8 UNDECIDED
21	The quality of ALJ decisions is enhanced by the pooling of the hearing office support staff	4.0 AGREE 91.2 DISAGREE 4.8 UNDECIDED
22	Pooling of support staff adversely affects the morale of the hearing office	76.0 AGREE 11.0 DISAGREE 13.1 UNDECIDED
23	Each ALJ should have the unsanctioned option of writing decisions without any assistance from support staff decision writers.	86.0 AGREE 8.2 DISAGREE 5.8 UNDECIDED
24	What is the organization of the hearing office to which you are currently assigned?	10.0 UNIT 90.0 POOLED
25	Which organization of hearing offices do you support?	86.5 UNIT 13.5 POOLED
26	Are you presently a member of the Association of ALJs, Inc.?	61.4 YES 38.6 NO

ALJ percentage responses to each question are indicated on the survey.

unit offices, given that OHA management has not presented the comprehensive statistical evidence to support the claim. Furthermore, the subjectivity of the factors used to favor pooling detracts from the credibility of the management decision as does the absence of a clear directive of what performance standards are expected to meet the goal of efficiency. Lastly, for the claimant seeking a fair hearing, the quality of the determination is critical and the ALJ is responsible for assuring that the claimant receives a valid decision. If the ALJ must rely upon support staff who are not accountable to that ALJ and are not personally involved in all of the case development, the chances for poorly researched and reasoned determinations are increased.

A survey

The SSA Office of Hearings and Appeals currently oversees the operations of 133 hearing offices throughout the country. Ten of these have "pooled" all of their support staff, three still use the unit format, while all others have varied organizations with a hearing assistant and or hearing clerk assigned to each ALJ and the remainder of the support staff pooled. In the latter organizational structure, ALJs do not exercise direct supervision over support staff assigned to them.[29]

Due to complaints from ALJs concerning the reorganization of hearing offices, the Association of ALJs authorized a survey of all SSA ALJs to assess the prevailing opinions on this issue. The survey questionnaire received a 76 per cent response rate with 421 ALJs responding.[30] The composite response demonstrated substantial support for the traditional hearing office organization with 86.5 per cent favoring the unit structure, and 13.5 per cent favoring some form of a pooled hearing office.[31] (Interestingly, even if all of the 133 ALJs who did not return the questionnaire favored pooled hearing offices, this would indicate that 34 per cent of the ALJ population support the reorganiza-

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[29] Phone conversation with Paul Rosenthal, Chief Administrative Law Judge, SSA Office of Hearings and Appeals, April 7, 1986.

[30] ALJs holding managerial positions, i.e., hearing office chief ALJs, regional office chief ALJs, and the national office chief ALJ, were not included in the survey since they are responsible for recommending and deciding the organizational structure for hearing offices.

Many ALJs noted that in a pooled hearing office, management is often less concerned with quality than with numbers of cases to report.

tion while 63 per cent of the entire group prefer the unit model.) Further analysis showed that 76 per cent of the respondents are assigned to pooled hearing offices but support unit offices whereas 13 per cent are assigned to pooled offices and support the pooled structure.[32] (See Figure 1 for ALJ percentage responses to each survey question.)

What are the reasons behind ALJ opposition to hearing office reorganization? Eighty-six per cent of the ALJ respondents disagreed that insufficient case development would be more likely in a unit hearing office than a pooled hearing office, and 82 per cent disagreed that removing the ALJ from case development would increase the efficiency of processing claims. An ALJ stated:

> A non-ALJ developer would not enjoy APA protection and thus could easily fall prey to the 'adjudicative climate' by being persuaded by management to reduce medical costs and reduce processing time by curbing development. I can even envision awards for non-ALJ developers.

The aggregate ALJ response also demonstrated concern for costs incurred through hearing office reorganization. Seventy-eight per cent of respondents agreed that the pooling of support staff has increased the number of superfluous management personnel in the hearing offices while 54 per cent agreed that the monetary costs of producing dispositions are higher in a pooled hearing office than a unit hearing office. One judge commented:

> Since 'reconfiguration,' we have added, in addition to our office manager, two assistant managers, one supervisory staff attorney, and two technical administrators.... (O)ur office productivity is only marginally improved since the days of the unit system.

A major issue over the implementation of pooling most of an ALJ's support staff has been the discontinuance of ALJ evaluation of staff job performance, even if a hearing assistant and/or clerk are assigned exclusively to an ALJ. The evaluation of all staff is conducted by hearing office management personnel. Eighty-two per cent of the ALJ respondents believed that the ALJ should be the immediate supervisor who evaluates the support staff working on his or her cases, and 77 per cent agreed that without ALJ evaluation of support staff job performance, the quality of support staff work declines. An ALJ wrote:

> We have three staff attorneys working for three ALJs. But only one ALJ (the ALJ-In-Charge) has any input whatsoever into their professional evaluation. Any time a staff attorney writes anything, he/she writes it the way the ALJIC wants it, not the way the individual ALJ wants it.

Besides seeing the pooling of support staff as an invitation to non-accountability, 79 per cent of the responding ALJs asserted that the imposition of productivity evaluations would adversely affect the quality of the decisions written by staff attorneys. Another 80 per cent believed that such productivity goals for support staff would impose pressure upon ALJs to increase their own productivity, and 68 per cent opposed the granting of case bonuses to support staff for high production. One judge noted:

> When numerical quotas are applied to the staff, a tremendous amount of very subtle pressure is applied toward ALJs to ignore due process requirements and quality work, and shoot for numbers only.

Of course, not all ALJs seek the role of evaluating staff job performance. One ALJ wrote:

> Supervisory work detracts from the judge's primary function. Why burden a judge to face controlling difficult people? Leave such responsibility to professional supervisors.

In considering how hearing office organization affects overall productivity, 71 per cent of ALJs responding disagreed that pooled hearing offices have a higher level of productivity than unit structures. Seventy-nine per cent disagreed that it is necessary for OHA to establish deadlines for case processing in order to guarantee timely ALJ dispositions. One ALJ commented:

> Deadlines do not work generally because each case is different.... (M)ost ALJs want to get the cases off of their docket.... (A) deadline means nothing when, as an example, you have a Remand Order that certain medicals be obtained, and the ALJ fails to get the cooperation from the doctor, hospital, etc.

The issue of quality decisions was emphasized by 64 per cent of responding ALJs asserting that pooled hearing offices produce decisions with a higher error rate than unit hearing offices. In conjunction, 91 per cent disagreed that the quality of ALJ decisions is enhanced by the pooling of support staff, and 72 per cent agreed that decisions writers' work is better under a unit hearing office than a pooled model. In their written comments, many ALJs expressed the opinion that the quality of decisions has more to do with the abilities of the support staff than the office organization. However, many ALJs noted that in a pooled hearing office, management is often less concerned with quality than with numbers of case dispositions to report to the regional office. In such an environment, quality control falls back upon the ALJ. One ALJ stated:

> The error rate depends on the ALJ. If the ALJ accepts the work done by the clerical staff and by the staff decision writers in a pooled hearing office, then a higher error rate would probably result.

Some ALJs favored a pooling of support staff to provide a fairer disbursement of capable and less capable personnel among the ALJs.[33] Several ALJs felt that junior judges were especially

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[31] The survey questionnaire defined unit hearing office to mean "an OHA hearing office in which each ALJ supervises and evaluates the work of a support staff consisting of a staff attorney, hearing clerk and hearing assistant, all of whom are exclusively assigned to the ALJ for the purposes of case development and decision writing. The term "pooled hearing office" was used to mean "an OHA hearing office in which no more than one support staff member is assigned primarily but not exclusively to a single ALJ and in which support staff are not evaluated by the ALJs." The term "productivity" was used to mean "the number of case dispositions made in a hearing office each month."

[32] The survey results indicated that of the respondents, 9 per cent are in unit hearing offices and support unit organization whereas 1 per cent are in unit hearing offices and support pooled structures.

[33] In a phone conversation April 7, 1986, Chief Administrative Law Judge Paul Rosenthal indicated that OHA's major reasons for pooling hearing office support staff are to provide both for the equitable distribution of support staff talent and for fair performance evaluation of support staff.

likely to be assigned mediocre support staff under the unit system. However, one ALJ wrote that such could be true even with a pooled staff:

> Pooling is not a means of random assignment, but is used to assign the poorest workers to those ALJs who are most vocal in opposition.

How is morale affected by hearing office organization? Seventy-six per cent of responding ALJs felt that the pooling of support staff adversely affects the morale of the hearing office, and 90 per cent disagreed that OHA management is responsive to ALJ opinions on hearing office reorganization. One ALJ wrote:

> In our office, a substantial majority of the personnel, including a majority of the ALJs, submitted a plan to central office retaining the unit system with modifications, but it was rejected. I have never seen morale so low throughout a hearing office as it is in this office.

However, another ALJ expressed support for a pooled staff in this context:

> While individual units may be happy, the morale of the office as a whole is higher in a pooled office. Pooling avoids or minimizes personality conflicts and rivalries.

The quality-quantity dichotomy created by the OHA drive to the pooling of support staff in hearing offices typifies the tensions within OHA for the past ten years. The stated motivation of OHA management to free ALJs from administrative and supervisory responsibilities and allow flexibility in the use of resources is admirable. While any reasonable person understands management's concerns over efficient case processing, such an emphasis to the possible compromising of the quality of decisions rendered is unacceptable. Certainly, the past history of OHA management controls and resulting litigations has created an environment in which the ALJs may be suspicious of techniques used to evaluate the quality and timeliness of their decisions.

OHA management has created an environment in which ALJs may be suspicious of techniques to evaluate their decisions.

An ALJ Corps

Given the years of management controls which have impinged upon the adjudicatory independence and effectiveness of ALJs, the 99th Congress considered legislation designed to remove the ALJ not from accountability for his/her work product but rather from the politically-motivated management goals of productivity and accuracy. The most enthusiastically received piece of legislation was Senate Bill 673,[34] introduced by Senator Howell Heflin (D-Ala.) on March 14, 1985. Known as the "Administrative Law Judge Corps Act," this bill proposes the creation of a specialized corps of all federal administrative law judges divided initially into seven divisions named as follows: (1) Division of Communications, Public Utility, and Transportation Regulation; (2) Division of Health, Safety and Environmental Regulation; (3) Division of Labor; (4) Division of Labor Relations; (5) Division of Benefits Programs; (6) Division of Securities, Commodities, and Trade Regulation; and (7) Division of General Programs and Grants. This bill would remove all beneficiary and regulatory ALJs from their approximately 30 employing agencies and designate them as employees of the ALJ Corps.

The primary motivation behind S.673 is to remove the appearance of bias presented when an agency as a litigant in an administrative hearing takes its case before one of its own employees. Certainly the adjudicatory independence of ALJs becomes even more questionable if an ALJ's decisions are subject to higher administrative review. Senate Bill 673 calls for a two-year study regarding the methods of agency review of ALJ decisions currently in use throughout the federal bureaucracy as well as recommendations to ensure that greater finality be given to ALJ decisions.

It has been argued that a major advantage to the ALJ Corps concept is that ALJs can be made subject to performance evaluations without undermining their adjudicatory independence.[35] Thus, the removal of the ALJs from their employing agencies and placing them into a corps is not a subterfuge for housing ALJs in an unaccountable environment. Rather, evaluation of ALJ performance will carry much more crediblity as it is accomplished by non-politically motivated administrators. Indeed, the "amount of misbehavior and unacceptable performance in the administrative judicary of the United States is probably smaller, because of merit and selection, than in any other American judiciary."[36] But this is not to say that ALJs should not be held responsible for their work. Senate Bill 673 provides that the Corps would recruit, examine, and qualify ALJ applicants since judges can probably select better judges than can personnel specialists. If ALJs are chosen carefully and evaluated by a neutral administration, ALJs should develop a highly professionalized sense of their positions as they serve a greater public interest.

A 1982 survey of the ALJs within the Social Security Administration[37] resulted in an 83 per cent response favoring an ALJ Corps. The most common reason for support (77 per cent) was the independence such a corps would afford. In order to escape the imposed irrationality of a politically responsive bureaucracy, ALJs should be housed in a neutral environment. This arrangement will assure private citizens seeking an impartial hearing that management directives are not controlling the adjudicator's decision but, rather, concern for due process and fairness. ☐

DONNA PRICE COFER holds a Ph.D. in government from Claremont Graduate School and has written two books in the area of administrative procedures.

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[34] S. 673, 99th Cong., 1st Sess., 131 Cong. Rec. 29, 2969 (1985). Formerly S.1275, 98th Cong., 1st Sess., 129 Cong. Rec. S 6609-13 (daily ed. May 12, 1983).

[35] *See* Joost, *A Corps of Federal Administrative Law Judges: Why? What Kind? Operating How? Under Whose Control?*, 19 N. Eng. L. Rev. 695 (1983-84).

[36] *Id.* at 699.

[37] Cofer, Judges, Bureaucrats, and the Question of Independence: A Study of the Social Security Administration Hearing Process, Chapter VI (Westport, CT: Greenwood Press, 1985).

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

June 4, 1986

The Honorable Charles E. Grassley
Committee on the Judiciary
Chairman, Subcommittee on
Administrative Practice and Procedure
United States Senate
Washington, D.C. 20510

Dear Senator Grassley:

I am compelled by the seriously misleading statement of Chief Judge Nahum Litt to your Subcommittee on May 15, especially as it concerns my integrity as a Judge, to enter the following response, and to ask that it be made a part of your record concerning the establishment of an ALJ Corps.

A sense of regret unavoidably attends the effort to defend one's good name and reputation as a Judge against an errant accuser who is himself a Judge. In this instance it is tempered by a certain relish to do battle with one who is so recklessly unfair about very serious matters, and who has shown so little care and concern for accuracy in his presentation to the Subcommittee.

Judge Litt used FLRA as an example of untoward influence upon ALJs by their agencies. The fair import of his remarks about my involvement in the PATCO case is that:

(1) The Chairman requested that I hear that case, thus placing the Judge with "understanding" of the Chairman's needs in position as trier of the facts.

(2) The United States Circuit Court, based on these allegations, appointed a master (ALJ) who found the above to be the facts.

(3) However, a finding of improper influence was rendered unnecessary because the public perception of the fairness of the process had already received a mortal wound even before the ex parte communications were revealed, when I issued my previously written and duplicated decision within an hour or two of receiving briefs.

I think it necessary to correct Judge Litt line by line, so numerous and wanton are what might charitably be called his mistakes. Here we are fortunate, for there is an extensive and readily available record of the entire matter in the decision of the United States Circuit Court for the District of Columbia (685 F.2d 547), against which you can easily check the accuracy of his assault, and assess his sense of responsibility and his motives in leveling such serious charges in disregard of that record.

(1) The PATCO case had nothing to do, as he asserts, with improper removal of Air Traffic Controllers. It involved PATCO's right to represent them.

(2) I had no conversation with the Chairman about the selection of a Judge. I did have lunch with the other two Members of the Authority, as to which ALJ Vittone made findings. In his findings of fact, he concluded that those Members "urged Judge Fenton to assign a capable judge to the case and, if possible, to assign the case to himself" (685 F.2d 547, 619). In his discussion at page 620, he concluded that:

> On August 4, 1981, Members Frazier and Applewhaite met with Chief Administrative Law Judge John Fenton at lunch to discuss the procedural aspects of the PATCO case. During that discussion, it was suggested that Judge Fenton appoint a capable judge, preferably himself, to hear the PATCO case. No party has argued in its recommended findings that this luncheon meeting was improper. Further, I do not believe that it had any impact or effect on the FLRA's decision in the PATCO case. However, that finding does not mean that such practices should be condoned.
>
> It is clearly possible that the special selection or assignment of a judge to a particular case could raise substantial problems. There is no evidence that Judge Fenton's assignment of the PATCO case to himself raises any problems in this proceeding. However, the practice of agency heads suggesting that a particular judge be assigned to conduct a particular case should be avoided at the FLRA and all other federal agencies. Such a practice may conflict with 5 U.S.C. § 3105, and may raise questions of administrative fairness in those agencies which may attempt to influence the selection of a judge.

5 U.S.C § 3105 requires assignment of Judges in rotation so far as practicable.

(3) The Circuit Court did not appoint a master/ALJ based on allegations having to do with me. Rather, the Court, having been informed by the Justice Department that its Criminal Division and the FBI had investigated allegations of improper contact between a "well-known labor leader" and an Authority Member during the pendency of the PATCO case, ordered an "evidentiary hearing to determine the nature, extent, source and effect of any and all ex parte communications and other approaches that may have been made to any member or members of the FLRA" while that case was pending before it. (685 F.2d 547, 557). My discussion with the Members was revealed at that hearing, during examination of the Members by PATCO's attorney. As Judge Vittone noted, PATCO did not contend that this contact was in any way improper. Judge Vittone nevertheless scrupulously addressed the issue and found it conduct not to be condoned. As noted, he found no evidence that my having taken the case in the face of such a request raised any problem in that proceeding. I take him not to be condoning the request as opposed to criticizing me for hearing it.

Permit me here a personal observation, inasmuch as my integrity is at issue. I find a certain irony in Judge Vittone's approach. He questioned the propriety of a contact which might affect the required assignment in rotation and "raise questions of administrative fairness in those agencies which may attempt to influence the selection of a judge". That scrupulousness in addressing conduct not found offensive by the parties was admirable. But it may have deserted him when he made findings about me without even letting me know that my conduct was in issue and providing me with an opportunity to testify. In fairness to him, he may have thought it unnecessary because he did not fault me. My recollection differs from that of Member Frazier, whose testimony forms the basis for Judge Vittone's finding. I recall that Mr. Frazier, understandably anxious that the Authority acquit itself well in response to a nationwide airline strike, did ask that I appoint a capable Judge. He then smiled, seeing the latent humor in his request, and said that the use of the word capable was not intended to exclude me. We laughed. I certainly did not take his words as an attempt to instruct me to assign myself. Nor, in my 14 years as an ALJ (all as Chief or Associate Chief) have I ever been personally aware of any effort by any agency official to intrude upon the independence of a Judge. Certainly FLRA officials have been absolutely scrupulous in this respect.

(4) Judge Litt's statement that a finding of improper influence was rendered unnecessary because I had already dealt a mortal wound to the public's perception of a fair proceeding by having my decision prepared for issuance upon receipt of the briefs, is simply wrong. Judge Vittone, as already indicated, found the contact had no effect upon the decision. More importantly, the United States Circuit Court found, at page 575:

> Moreover, the facts of this case are free from any arguable taint. The extensive inquiry revealed no improper attempts to influence Chief ALJ Fenton or his fact-finding. The FLRA did not alter his factual conclusions. (underscoring mine).

The Court did, in a sense, address the matter of my very prompt issuance of my decision (page 554). Thus, it noted that PATCO had excepted to my decision on the ground that I "failed to give reasoned consideration to its brief". It noted that FLRA rejected that argument because my "Decision did address the arguments raised in PATCO's brief (despite a period of only four hours between the filing . . . and the issuance)", and that PATCO did not renew that argument before the Court.

The Court otherwise found no merit to any of the arguments about the fairness of the manner in which I handled the case. I of course, make no apologies for dealing with a case of such moment as quickly as I responsibly could. I am proud of that achievement. There was no real dispute over the facts, and the legal arguments were easily anticipated. My decision was, indeed, ready to go in the event that briefs failed to raise issues I had not already covered to the best of my ability.

In sum, it is clear that a Chief Judge has deliberately disregarded the findings of a United States Circuit Court of Appeals in his testimony before your Subcommittee because those findings conflict with his purposes. One can speculate on what overriding ambitions and personal agendas might explain such conduct in the face of an easily ascertainable public record which reveals his very grave accusations to be falsehoods. Should the Subcommittee be tempted to give serious consideration to his views on the need for a Corps and the claimed inadequancies of the present system, it is imperative that it consider those agendas and his demonstrated willingness to mislead it in order to advance them. as it weighs his testimony about other agencies.

The burden of Judge Litt's remarks about my caseload seems to be that it has been consistently "over estimated" (sic) and, in fact, misrepresented to the Congress. It should first be noted that the "depositions (sic) after hearing" which he notes are not simply "caseload", i.e., the amount of work we receive. They are, as estimates, a prediction of the number of decisions which a given number of Judges can write, with whatever consequences that will have on backlog and timeliness of decisions. As he notes, the 1985 Budget Request estimate for such decisions was 191. That projection was made in December of 1983 in an attempt to forecast two years ahead. In the following year (1984) that was revised to 154, based essentially on a sharp increase in the settlement rate and a drop in complaints. Thus the 191 forecast was associated with 688 other cases in which I anticipated settlement, and the 154 decisions were associated with 704 cases which I expected would be settled on the basis of an improving settlement performance. The decline of cases disposed of was from 877 to 848. I saw no need to reduce the number of Judges given the ample backlog to be worked and the uncertainties of the future, which included the likely loss of Judges.

Litt also says that our FY 86 budget submission indicated actual disposition of 162 cases after hearing, whereas a docket survey indicated 137 such decisions. Aside from noting that those 162 decisions are eight more than I had predicted the year before, the discrepancy he finds, but did not inquire about through his staff member who made his count, arises from my two systems of counting the decisional product. Cases are counted, by case number, as the General Counsel prepares to issue complaints and seeks docket space. They must be counted the same way - by case number - as they leave the system if my books are to balance. Each case number is therefore counted as a decision even though they may have been consolidated for hearing and issue in one "decision" or document. I also count by documents. In 1985 we issued 162 cases by number and 140 (not 137) by document.

In terms of my capacity to help Litt, which is what his undertaking in this respect is allegedly about, I would make two points. First, though he has expended considerable DOL resources in an effort to determine how many Judges I need (in an area of which he is unusually ignorant), he has never discussed the matter with me, and he has never requested help from me. Second, although my caseload has declined, one ALJ left in February of 1985 and another last month. He knows this, and knows he is beating a dead horse for other purposes.

I would also make several general points about matters within my experience. (Unlike Litt, I try to confine my serious remarks to matters within my competence). Litt attempts to rate the difficulty of cases at the NLRB and here. I spent over 20 years at NLRB, leaving the post of

Assistant General Counsel to become Associate Chief ALJ at DOL for eight years. I know well the work of DOL, including Black Lung. His characterization of "most" work at NLRB as routine is, apart from his motives, simply silly. The range of case law to be understood and applied in labor cases, and the caliber of counsel encountered, makes most DOL work trivial in comparison. The latter can often be disposed of by formula. A look at the volume of Labor Board vs Labor Department cases which receive the attention of the Courts, and the many and sharp splits among the Circuits in Board cases attest to the vast difference in their complexity.

Finally, I would note that it is evident that Litt spends considerable DOL resources monitoring the work of other agencies, under the guise of demonstrating the presence of available manpower elsewhere, but, one must suspect, in the self-aggrandizing effort to become Super Judge over the Corps. This, and his spirited defense of the EPA ALJ's*/ use of government time and resources on the affairs of ALJ professional associations suggests that he sees no limit to such expenditure of agency appropriations except those imposed by the conscience of the individual Judge, whatever its impact on that agency's work.

Respectfully,

John H. Fenton

John H. Fenton
Chief Administrative Law Judge

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*/ Note that his treatment of this matter, one of seven examples of "Direct and obtuse, if not clearly improper occurrences (which) are, and have been rampant" contains no slight suggestion that the investigation of that Judge's conduct is based on any consideration tied to her judicial independence. The author is indeed obtuse as to the purpose of this example.

Senator HEFLIN. All right. Judge Johnson, we would be delighted to hear from you.

STATEMENT OF JULIUS JOHNSON

Judge JOHNSON. Mr. Chairman, members of the subcommittee, I am Julius A. Johnson, an administrative law judge with the U.S. Department of Labor. I have previously submitted my statement which I would request be made a part of this record, and in the time that has been allowed to me I would like to relate some portions of it.

The proposed legislation establishes a new governmentwide corps for all current and future administrative law judges who will belong to one of seven subject matter divisions.

The merits of the proposal are that it creates independence for judges in their vital function as factfinders and it enhances the efficiency of the administrative law process. Either reason standing alone would justify creation of this corps.

As a measure to ensure the independence of administrative law judges, S. 950 recognizes the important role that these judges perform as traditional triers of fact in dispute resolution. It corrects a widespread perception shared by litigants and lawyers alike of such judges merely as an arm of an agency, subject to its real or imagined influences.

It remedies the basic incongruity between the theoretic, impartial factfinder and the practical agency employee who, like any other employee, is subject to agency determination of such matters as tenure, salary, promotion, office space, staff, facilities, and materials.

Such power over the administrative law judge potentially subverts the role of a judge whose very function implies freedom from extraneous pressure whether it is overt or subtle.

Since administrative law judges perform as triers of fact, essentially the same function as Federal district judges and State trial judges, they should have the same independence inherent in the exercise of that authority by deciding a cause solely in accordance to its merits.

Such status would be fully consistent with traditional notions of fairness in the administration of justice and, in my view, can best be achieved under the provisions of this proposal.

The proposed legislation also will centralize management, personnel, functions, and facilities, and thereby create greater efficiency in total operations in the decisionmaking process.

Simply by pooling and consolidating many facilities and resources now spread among many Federal agencies, the corps would improve management of personnel and cases, eliminate costly travel, and avoid duplication of facilities and effort.

Pooling of administrative staffs, receptionists, docketing clerks, and libraries and research facilities alone would result in great cost-saving benefits. For example, rather than the separate docketing offices in Washington, DC, for some 29 different Federal agencies, one office with the computerized capacity of the U.S. Department of Labor could handle all docketing for all such offices.

From a management standpoint, the chief judge of the corps and the division chief judges, as contemplated under this proposal, would have the flexibility to assign and distribute cases in a way to adjust to the ebb and flow of litigation and the caseload of particular judges. This would avoid delay in disposition.

Under the proposed act, the authority of the Council to transfer or to reassign judges from one division to another, as well as to restructure a division itself, provides optimal management flexibility. It permits resources to be redirected as necessary.

Moreover, assignment of an administrative law judge in a particular division permits broader specialization within a given subject matter area, in contrast to a single statute adjudication by most agencies under the present system.

I will submit the balance of my statement and make only this one point further in view of the limitation on my time. The proposal under the authority of a council would create uniformity in practice and procedure in the administrative law process which does not exist now.

I would suggest to the subcommittee that there were great benefits when the Federal Rules of Civil Procedure were promulgated in 1938; there were great benefits when the Federal Rules of Evidence were promulgated in 1978, all with the end that it enhanced the practice in Federal district courts.

I submit that this bill would enhance practice before Federal administrative agencies and enhance the administrative law judge process.

Thank you, Mr. Chairman.

[The prepared statement of Judge Johnson follows:]

STATEMENT IN SUPPORT OF S. 950, THE "ADMINISTRATIVE LAW JUDGE CORPS ACT."

I am Julius A. Johnson, an administrative law judge with the United States Department of Labor.

This statement is submitted in support of S. 950, the "Administrative Law Judge Corps Act."

The proposed legislation establishes a new government-wide corps for all current and future administrative law judges who would belong to one of seven subject matter divisions. The merits of the proposal are that it creates independence for judges in their vital function as factfinders and it enhances the efficiency of the administrative law process. Either reason, standing alone, justifies the creation of this Corps.

As a measure to ensure the independence of administrative law judges, S. 905 recognizes the important role that these judges perform as traditional triers of fact in dispute resolution. It corrects the wide-spread perception, shared by litigants and lawyers alike, of such judges merely as an arm of an agency, subject to its real or imagined influences. It remedies the basic incongruity between the theoretic impartial factfinder and the practical agency employee, who like any other employee, is subject to agency determination of such matters as tenure, salary, promotion, office space, staff, facilities, and materials. Such power over the administrative law judge potentially subverts the role of a judge whose very function implies freedom from extraneous pressure, overt or subtle. The importance of a case to the agency may only magnify the perception - or the actuality - of susceptibility of the judge to that agency's influence when the employer-employee relationship exists.

Since administrative law judges perform as triers of fact essentially the same function as federal district judges and state trial judges, they should have the same independence inherent in the exercise of that kind of authority by deciding a cause solely in accordance with its merits. Such status would be fully consistent with traditional notions of fairness in the administration of justice and can be best achieved under provisions of the proposal.

The proposed legislation, in its corps concept, would centralize management, personnel, functions and facilities, and thereby create greater efficiency in total operations in the decision-making process.

Simply by pooling and consolidating many facilities and resources, now spread among many federal agencies, the corps would improve management of personnel and cases, eliminate costly travel, and avoid duplication of facilities and effort. Pooling of administrative staffs, receptionists, docketing clerks, and libraries and research facilities, alone, would result in great cost-saving benefits. For example, rather than separate docketing offices in Washington, D.C., for some twenty-nine different federal agencies, one office, with the computerized docketing capacity of the United States Department of Labor or the National Labor Relations Board, could handle all docketing with time-saving standardization of procedures. Consolidation of offices and hearing rooms around the country would have its obvious benefits, not only in the elimination of frequent travel, but also in the effort and expense in acquiring other accommodations.

From a management standpoint, the chief judge of the corps and the division chief judges, as contemplated under the proposal, would have the flexibility to assign and distribute cases in a way to adjust to the ebb and flow of litigation and the caseload of particular judges. This would avoid delay in disposition.

Under the proposed Act, the authority of the council to transfer or to reassign judges from one division to another, as well as to restructure a division as deemed appropriate, provides optimal management flexibility. It permits resources to be redirected as necessary. Moreover, assignment of an administrative law judge in a particular division permits broader specialization within a given subject matter area, in contrast to single-statute adjudication by most agencies under the present system; it also permits, by assignment of the judges to other divisions, specialization ultimately on a broader statutory scale. This allows administrative law judges the intellectual, legal diversity in cases, as well as the practical, factual variety, incident to the true trial function, as with federal district judges and state trial judges. To some extent, judges under the proposal would likely be both generalists and specialists.

Finally, the proposal, under the authority of a council, would create uniformity in practice and procedure in the administrative law process. Rather than contend with the welter of varying agency procedural and evidentiary rules, the judges, lawyers, researchers and parties alike could rely upon comprehending one uniform set of rules and procedures governing administrative litigation. The benefits to federal administrative practice, and the public confidence it would inspire, certainly could be no less than the contribution of the Federal Rules of Civil Procedure and the Federal Rules of Evidence to the enhancement of practice before the federal courts.

In conclusion, the proposed legislation for the administrative law judge corps ensures the independence of administrative law judges and enhances the efficiency of the administrative law process.

Julius A. Johnson

JULIUS A. JOHNSON
Administrative Law Judge
United States Department of Labor

Senator HEFLIN. Thank you. I may submit some questions in writing.

Senator Grassley.

Senator GRASSLEY. Mr. Chairman, since Judge Fenton's letter has been mentioned two or three times, I would ask unanimous consent that his letter to the committee on June 4, 1986, be placed in the record right after Judge Palmer's testimony so that people reading this record will have access to that.

Senator HEFLIN. Without objection, so ordered.

Senator GRASSLEY. I would like to ask a series of questions, and my basis for asking these questions is the role of administrative law judges in the fair housing bill that is going to be before this committee.

As you gentlemen would know, the fair housing bill is going to authorize ALJ's from the Department of Housing and Urban Development to hear complaints of housing discrimination. They could then levy fines up to $100,000, including punitive damages, and issue injunctions against violators.

Under S. 950, in what division would HUD ALJ's be placed?

Judge PALMER. I would think it would go into Division 7, which is the general division.

Senator GRASSLEY. Could you tell me roughly the total number of HUD judges?

Judge PALMER. They only have one right now.

Senator GRASSLEY. One?

Judge PALMER. They have one judge. That is an example of the one-judge agencies that we have here in town. We have about seven agencies where there is just one judge.

Senator GRASSLEY. OK. Besides HUD, then, what other agencies' ALJ's would comprise that Division 7?

Judge PALMER. Let me consult my notes on the subject.

Senator HEFLIN. I have it. Seven is Drug Enforcement Administration, Department of Housing and Urban Development, Food and Drug Administration, Bureau of Alcohol, Tobacco and Firearms, the Maritime Commission, U.S. Postal Service, Merit Systems Protection Board.

Senator GRASSLEY. And then, roughly, how many judges would be involved with that total division?

Judge PALMER. There are not too many judges in those agencies. There is a small number. I think Coast Guard might be added to that list, and I would also think that would be the division where, if a new agency came aboard, the cases would go there. It is just a nonspecific division.

Numbers have come up before about the divisions. The divisions, as I understand the bill, are not really in terms of dividing the judges in a numerical way, but dividing the legal questions in a way that would fit into administrative law specialities.

Senator GRASSLEY. The point I am getting to is that these other ALJ's from these other agencies could presumably be ruling on the housing discrimination claims and awarding damages and issuing injunctions, right?

Judge PALMER. That is correct.

Senator GRASSLEY. Are you aware of any other statute that permits an ALJ to make punitive damage awards?

Judge **Palmer**. No, I am not. I think that is something new. I testified before the House on the fair housing bill and we had a lengthy discussion over there about the bill. My purpose in testifying there was there was some question about whether or not these cases should be heard by administrative law judges or by district courts or by alternate dispute resolution.

I do believe that administrative law judges would be able to hear them. I believe that what this bill properly does, and does so well in the present version of it, it provides that specialized training will be given to judges as they go into a new area.

When you set up any new program, be it under a bill like this that comes aboard at one of the agencies that are existent now, new applications of judicial skills are required. This past 4 years, the Department of Agriculture has taken on hearing responsibilities in some nine new statutes which concern matters that we never heard before, but as a judge you learn the area. I see no problem.

Our judges are extremely well qualified people. The screening process to become an administrative law judge is one of the most rigorous in America today. You have to go through a written and an oral examination. You have to show that you've been a practitioner for some 7 to 10 years. You have to show that you have actual experience as a trial lawyer.

You have to write a decision in a hypothetical case; it's an all-day written examination for that purpose. The people that are coming aboard now—and I have had occasion to look at the recent list of people being certified at the top of the list. We only select from the top three. The bill would allow us to select from the top five.

But the people that now rank as the top three consist of two supreme court justices from the State of New York and a practitioner who is well regarded here in Washington. The people that have been coming aboard as administrative law judges are highly qualified lawyers and judges.

Senator **Grassley**. I will submit questions to Mr. Johnson in writing.

Senator **Heflin**. All right, sir.

Senator Thurmond, do you have any questions?

Senator **Thurmond**. I just have two questions of Mr. Johnson.

Judge **Johnson**. Yes, sir.

Senator **Thurmond**. Judge, would we subject litigants to more complex procedures and more difficult substantive issues if we create a corps of judges removed from the agencies?

Judge **Johnson**. I would say we would not. The judges under the corps would simply be applying the statutes of these various agencies, something which I might add would be something they are quite prepared to do.

For example, the Department of Labor has an Office of Administrative Law Judges totaling some 70 in number, and unlike many of the other agencies, at the Department of Labor the judges hear cases under some 25, 30, possibly 35 different statutes.

These various statutes, while they do have different procedures and different laws and regulations, they do not add to the complexity of the cases, necessarily, and any of the judges in this particular office, for example, would be quite prepared and quite competent in disposition of such cases.

Senator THURMOND. Judge, would the requirements for uniform procedures in the corps conflict with the goals and practices of the various agencies?

Judge JOHNSON. I would think not. I think a uniformity in practice and procedure would only enhance the disposition of the cases before any particular agency, just as, as I mentioned, the Federal Rules of Civil Procedure and the Federal Rules of Evidence have enhanced practice in the Federal district courts. It could only be a great benefit in ultimate practice and use.

Senator THURMOND. Thank you, Mr. Chairman.

[Questions and answers of panel, subsequently received for the record, follow:]

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September 2, 1987

Senator Howell Heflin
Chairman
Subcommittee on Courts and
  Administrative Practice
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator Heflin:

The following are my answers to the supplemental questions posed by you and Senator Grassley.

Senator Grassley's Questions

Senator Grassley - Question 1:

As follow-up to my line of questioning on the Fair Housing bill pending before the Judiciary Committee, please respond to the following: under S. 950, HUD would be part of Division 7 (general programs) of the Corps of ALJ's. Assuming that the number of fair housing discrimination claims exceeded the ability of the one present HUD judge, does S. 950 contemplate that housing discrimination cases would then be heard by ALJ's from (among others) SBA, FDA, Postal Service, Coast Guard, etc?

Answer:

Yes. Division 7 was designed to house judges serving agencies where case volumes are small and do not constitute a major legal specialty. HUD at present has very few hearings and its one ALJ is often loaned to other agencies. It is expected that as new federal agencies are created, their cases will be initially heard by the judges in this division. However, whenever a new legal specialty crystallizes and produces a substantial volume of cases, the Council of the Corps is empowered to give appropriate consideration to the creation of a new division. This is likely to occur after fair housing discrimination cases develop a track record. Under the

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present system, without a Corps, a large number of new and inexperienced ALJs would have to be hired by HUD to assist the one ALJ presently in its employ. Inasmuch as the hearings will probably be held throughout America, and not confined to Washington, HUD would also have to obtain offices and hearing rooms for its new ALJs, nationwide. With the Corps in place the existing regional offices and hearing rooms for ALJs presently employed by NLRB, DOL, SSA, and Coast Guard would be available and thus needless expense could be saved.

Senator Grassley - Question 2:

Are the AlJ's from these other agencies commonly called upon to decide issues of alleged discrimination under federal civil rights statutes (including ruling on the use of "effects tests" to show discriminatory intent)? If so, please describe the types of cases, citing the statutes which confer the authority to the ALJ's.

Answer 2:

ALJs hearing employer-employee discrimination cases under the National Labor Relations Act and the Federal Labor Relations Act, presently hear cases as complex as any that would require a ruling under the "effects test." It may be that the Council would decide that these new cases would be better assigned to Division 4 where those ALJs will serve; that is within the Council's perogatives.

Senator Grassley - Question 3:

Under current law, can senior, retired ALJ's be employed by agencies to hear cases as needed? If so, can you estimate the number of judges in this potential "pool"? Why can't these judges be used to reduce agency case backlogs?

Answer 3:

Senior, retired ALJ's may be employed through OPM to hear cases, but the pay they receive from an agency is reduced by their annuity so that in effect they are paid very little for taking on again the burdens they yielded at retirement. There are, however, 80 retired ALJs listed with OPM as available for such assignments. Recently, the Department of Justice, insisted on interviewing and screening prospective candidates for assignment to a newspaper merger case, and after a retired ALJ was selected in this manner, charges were made that DOJ had improperly circumvented the APA's requirement that cases be assigned to ALJ's in rotation.

Senator Grassley - Question 4:

Does the Chief Judge of the Corps serve at the pleasure of the President? If not, how is he removable? To whom is he accountable?

Answer 4:

The Chief Judge will serve for a five year term. But as will be the case with any other ALJ, he is removable for misconduct, neglect of duty, and physical or mental disability upon a notice of adverse action being filed against him by the Council with the Merit System Protection Board, for a determination on the record after an opportunity for a hearing. The Chief Judge is accountable to the Council which in turn must act on all complaints by any interested person, including parties, practitioners and agencies.

Senator Grassley - Question 5:

Under S. 950, are the judges subject to discipline by the agencies whose cases they hear? If not, why not? Can an agency file a complaint against an ALJ with the Merit Systems Protection board? Can the agency file a complaint with the Chief Judge of the Corps? Section 589 states that a panel of three members of a "Complaints Resolution Board" will "inquire" into complaints of misconduct. Please elaborate on the procedures of this inquiry. For example, will testimony be taken; will there be a right to confront the party bringing the complaint, etc?

Answer 5:

When Section 589 was drafted, the intent was to apply to ALJ's, all of the "peer review" initiatives made applicable to Article 3 federal judges under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980. It was not intended to shield ALJ's in any way; increased accountability was the the goal. Presently, an agency seeking to discipline an ALJ must overcome the preliminary objection that the agency is in reality an aggrieved party that regularly appears before the ALJ. It was on the basis of "interference with decisional independence", that a reprimand against an ALJ at the Federal Mine Safety Review Board was expunged by order of the Attorney General. Under the bill, the Corps' Council will be the complainant not the agency, and this objection loses force. This serves to provide greater assurance that ALJs who are guilty of misconduct or have neglected their duties will be held accountable and disciplined.

Having said this, let me explain that an ALJ who fails to give satisfactory performance, is short-tempered, or may dawdle when issuing decisions in even the simplest of cases, often does not realize his or her shortcomings. A conference with several colleagues--the ALJ's peers--often is what is needed for the judge to take self-measure and modify his or her behavior. The Department of Labor has such a system in operation,and it works.

It is envisioned that upon a complaint being filed against an ALJ, three other ALJ's, none of whom are in the same division as the one who is the subject of the complaint, will be selected by the Council to investigate the charges. It is anticipated that the Council will pick three ALJs who are highly respected in the ALJ community and who will employ good judgment in the way they investigate a complaint. It may be that as time passes and experience develops, formal rules and regulations will be promulgated by the Council for the conduct of the inquiries. But I would prefer to rely on the common sense and good judgment of the three-judge Complaints Resolution Board. What is most important is that before a minor complaint becomes a formal case before the Merit Systems Protection Board, the peer group meet with the ALJ and give the judge the benefit of its collective wisdom and a chance for the judge to take self-corrective action. Some charges will, of course, involve matters so egregious, as to mandate the filing of a formal complaint. It is only after the filing of a complaint that testimony will be taken, etc.

Senator Heflin's Questions

Senator Heflin - Question 1:

One of the main concerns raised in opposition to the Corps concept is that the Corps system will undermine the expertise of Administrative Law Judges. How would you react to this concern?

Answer 1:

The bill itself meets this concern.

Section 585(d)(12)and (13) make provisions for continuing judicial education to maintain and enhance the level of expertise in the divisions of the Corps, and require the Council of the Corps to consult with an agency to assure that every judge assigned to hear cases of an agency has necessary training in the specialized field of law of that agency. Moreover, as Judge Thomas points out at pages 9 and 10 of the monograph attached to my formal statement

> "if true that specialization is more efficient and produces a higher quality product, then the managing judges would seemingly want to retain as much of it as possible as long as there is a sufficient number of cases in any given program area for which the speciality has been attained, the proposal would maximize use of this specialization. However, at any time judges in a given speciality are idle, for whatever reason, their time could be valuably spent on other cases. The Corps would be able to utilize judge time that otherwise would be lost when judges temporarily are out of work....unification and specialization are not enemies; both are compatible in a Corps."

Senator Heflin - Question 2:

It has been asserted that establishment of an independent Corps would result in substantial cost savings in administrative adjudications. How do you substantiate this claim?

Answer 2:

Again Judge Thomas has addressed this issue in his monograph at pages 10 thru 14 (footnotes omitted):

> "If only the D.C. offices of administrative law judges were brought together under one umbrella organization, tremendous cost savings would result. The pooling of administrative staffs, receptionists, docketing clerks and libraries would allow reduction of the support staff. The consolidation of physical facilities and resources would also result in more efficient and economical operation of the hearing process. For example, instead of twenty-nine separate docketing offices in Washington, D.C., only one would be necessary. At present, both the DOL

and the NLRB have computerized docketing systems, each capable of handling the docketing needs for the rest of the agencies. Approximately twenty-eight docketing offices could be eliminated and docketing procedures could be standardized. The many libraries and hearing rooms maintained for the D.C. offices of administrative law judges would also become superfluous.

The experience of the states which have adopted Central panel systems illustrates that such consolidation can greatly reduce costs. Ten states have adopted the central panel system for administrative adjudication: California, Colorado, Florida, Massachusetts, Minnesota, Missouri, New Jersey, North Carolina, Tennessee, and Washington. central panel systems vary from state to state, but all are similar to the Heflin bill's corps proposal in that an independent agency employs administrative law judges to conduct hearings arising out of other agencies. All of these states report that their Central panel systems save both time and money. Opponents of the corps, however, argue that the benefits reaped by the state central panel systems do not automatically translate into the same benefits for the federal administrative system. The federal system is much larger and more spread out than the various state systems, they argue. This is undoubtedly true, but the corps proposal provides for both consolidation and decentralization of the federal administrative hearing process. Logically, the savings realized by the states should be even greater in the federal system.

A large percentage of the 1,034 federal administrative law judges work mainly in Washington, D.C. Some of the larger agencies maintain offices throughout the United states. The DOL, for instance, has seven district offices, and the SSA stations administrative law judges in almost every major city. Nevertheless, many judges must travel as often as one week each month in order to conduct hearings in places remote from both the Nation's Capital and the district offices. To a large extent the federal administrative hearing system radiates from D.C. throughout the United States. Not only is this arrangement costly, given the expense of air fare and hotel accommodations, it is unwieldy for the judges who must travel constantly, and it is cumbersome for the parties.

The parties often have difficulties dealing with a geographically distant office. One of the drawbacks is that ministerial matters, often dealt with over the telephone, can run up the expense of the hearing process. The mail delay for filing documents can be substantial, thereby further slowing down an already slow system. And parties are less likely to secure last-minute continuances of the hearing because of the cost involved.

Lawyers are accustomed to practicing in courts with judges constantly in residence. Calendar calls are held to schedule the trial of cases and the calendar is adjusted almost daily to meet the needs of the parties and the court. Judges have the luxury of being able to accommodate the bar's need for flexibility. In federal administrative law hearings many lawyers are surprised to learn that requests for continuances are not automatically granted. When continuances are granted, great waste results. The administrative law judge who grants a continuance during a planned week of hearings allows a gap in his itinerary and this time is lost. Furthermore, the judge must make a return trip to the area to complete the continued case; in addition to the obvious waste, this may lead to considerable delay because the judge will be able to return not simply when the case is ready to be heard, but only when there are also other cases in the area to be heard, to make the trip worthwhile.

Another inconvenience of the current arrangement is that hearing rooms must be secured on a case-by-case basis. While most agencies provide hearing rooms in Washington, D.C., when administrative law judges travel there are few facilities in which to conduct their hearings. Although courtrooms are sometimes donated for an administrative law judge's use, for the most part courts do not want others using their facilities. Furthermore, appropriate facilities are, more often than not, being used. Thus, administrative law judges must occasionally conduct hearings in tiny conference rooms in federal buildings, and more often, hotel rooms.

The restructuring of the system which would occur upon the creation of a corps would ameliorate these problems. More judges would be dispersed throughout the Untied States. This decentralization would eliminate or decrease the extent of travel that takes place. Furthermore, judges could more often hear cases that arise in their vicinity not only because more judges would be located in outlying areas but also because judges would be able to hear any case requiring a hearing under the APA and not just cases arising out of one agency. Thus, more efficient scheduling would be possible, as would the establishment of permanent hearing rooms. Consequently, the several problems attendant with judges have to "ride the circuit," are remedied.

The corps scheme fosters better case management by allowing case assignments to be based not only on geography but on workloads as well. Administrative law judges' caseloads vary greatly depending upon the agency where the judge is employed. Some agencies have a backlog of cases waiting to be heard, pressing their judges with a monotonously steady stream of cases, while other agencies have intermittent caseloads and their judges hear cases only sporadically.

When Congress passed the APA in order to improve the administrative hearing process it undertook to provide for its efficient operation by permitting agencies to loan and borrow judges. Although the loan program has been in effect since the passage of the APA, it is widely recognized that it has not been very effective. Judge Marvin H. Morse, a former director of OPM's loan program, stated:

> The deficiency has been demonstrated over and over again by OPM's inability promptly to fill the demands made on it by borrowing agencies from among those employing agencies willing to make their judges available....OPM as a borrower must beg for assistance...it begged for help when I managed the program; it was made clear that

> such is the case today as recently as April 8 of this year [1986] when my successor at OPM, with his staff, met with the chief administrative law judges, and stressed OPM's virtual inability to meet demands.

> The reasons behind the loan program's ineffectiveness are of secondary importance to this writing and are more appropriately the subject of another paper. What is important, however, is that this program has been ineffective. It has not imparted the desired flexibility to the present system, nor is it likely to do so in the near future. Consequently, administrative law judges must needlessly contend with a system lacking a mechanism to even out their workload.

> The corps would provide the flexibility required to ensure uniform workloads under the Heflin bill. Judges would be grouped in the following divisions: 1) Division of Communications, Public Utility and Transportation Regulation: 2) Division of Safety and Environmental Regulations; 3) Division of Labor; 4) Division of Labor Relations; 5) Division of Health and Benefits Programs; 6) Division of Securities, Commodities, and Trade Regulation; 7) Division of General Programs and Grants.... The degree of crossover of judges between division has not been determined, but the barriers that currently exist in the loan program will not be present.

Senator Heflin - Question 3:

During the hearings in the 99th Congress, the Department of Justice spoke about administrative law judges as "the conscience of the agency." How would you reconcile the role of administrative law judges between the "conscience of the agency" and an impartial arbiter?

Answer 3:

Administrative law judges do not now nor would they in any sense under the Corps, exercise a policymaking role on the issues that go to the "conscience of an agency." the function of an administrative law judge is to act as an impartial arbiter who applies and refers to existing agency policy which pertains to the case before the judge. If an administrative law judge ignores agency policy or mistakenly anticipates a policy choice that an agency does not wish to make, such mistakes are corrected by the agency when it reviews the administrative law judge's decision. The supremacy of the agency over matters of policy and the right of each agency to review an ALJ decision to change it, will not be changed in any way by enactment of the Corps bill.

Senator Heflin - Question 4:

Some have raised concern that by making the Council the policy-making body of the Corps that the Council may initially set up "related" agencies in divisions, i.e., NLRB with the Federal Labor Relations Authority and then abolish the division thereafter. The council does have the authority to create or abolish divisions. What prevents these fears from being realized?

Answer 4:

It would make absolutely no sense for the Council of the Corps to take such a step. Inasmuch as complex cases can be heard most efficiently by judges with experience in the subject matter, it stands to reason that as long as there is a sizable volume of such cases, justifying a special division, the division will be retained. It should be remembered that Council membership is not permanent and for a member to be appointed to a succeeding five years there must be evidence that good judgment was exercised. Any step such as the one suggested which would diminish expertise and lessen overall efficiency would probably serve to defeat a reappointment.

Senator Heflin - Question 5:

Agencies have expressed concern that an independent Corps of administrative law judges will impede their ability to control their caseload and manage their dockets. Recognizing the need for agencies to be able to rely on an expeditious resolution of agency adjudication, how will the Corps respond to the need of particular agencies concerning procedural matters?

Answer 5:

Courts are required to respond to "speedy trial needs" and to otherwise give expedited consideration to various types of urgent matters in accordance with published rules of practice which provide for such treatment to be given. The Corps would be subject to similar rules of practice which shall be formulated in response to requests by agencies and Congress.

Senator Heflin - Question 6:

Is the current system of "loaning" administrative law judges between agencies an efficient system?

Answer 6:

No, the loan program is not an efficient system. Agencies with slack time are hesitant to admit it by volunteering their judges for fear that judges will be cut and personnel reduced. The problems encountered in the loan program were recounted by Justice Antonin Scalia upon his conclusion of a special research project on the subject while a law professor. He concluded that a special corps of administrative law judges who were not employees of any given agency, was needed for such temporary assignments. See Scalia. "The Hearing Examiners Loan Program," 197 Law Journal 319, (June 1971). Justice Scalia, at page 361, urged that upon creation of an ALJ corps: "There would be less reason to mistrust the quality of the borrowed...(ALJ), since the question which the lending agency will ask itself in order to determine his availability is not "Whom can we spare from our proper work?", but "Who is the best member of our staff for the particular job which is our own proper work?"

Senator Heflin - Question 7:

How are cases assigned in agencies? Does this procedure provide an opportunity for control over agency decisions?

Answer 7:

Cases at most agencies are assigned by the Chief Administrative Law Judges who is required to assign cases "in rotation, as far as practicable". This is no real limitation on assignments which can be made with an eye to pleasing the agency heads who control the type of support the Chief ALJ will receive in terms of staff, space, budget allocation, etc. For this reason, there are very real temptations for a Chief AlJ to assign controversial cases, in which the agency is known to be interested in achieving a particular result, to an ALJ whose known predilections make it likely that the desired ends will be realized, and the Chief ALJ's life made simpler.

Respectfully submitted,

VICTOR W. PALMER
Chair

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SENATOR HEFLIN'S QUESTIONS

FOR JUDGE JOHNSON

1. ONE OF THE MAIN CONCERNS RAISED IN OPPOSITION TO THE CORPS CONCEPT IS THAT THE CORPS SYSTEM WILL UNDERMINE THE EXPERTISE OF ADMINISTRATIVE LAW JUDGES. HOW WOULD YOU REACT TO THIS CONCERN?

2. IT HAS BEEN ASSERTED THAT ESTABLISHMENT OF AN INDEPENDENT CORPS WOULD RESULT IN SUBSTANTIAL COST SAVINGS IN ADMINISTRATIVE ADJUDICATIONS. HOW DO YOU SUBSTANTIATE THIS CLAIM?

3. DURING THE HEARINGS IN THE 99TH CONGRESS, THE DEPARTMENT OF JUSTICE SPOKE ABOUT ADMINISTRATIVE LAW JUDGES AS "THE CONSCIENCE OF THE AGENCY." HOW WOULD YOU RECONCILE THE ROLE OF ADMINISTRATIVE LAW JUDGES BETWEEN THE "CONSCIENCE OF THE AGENCY" AND AN IMPARTIAL ARBITER?

4. SOME HAVE RAISED CONCERN THAT BY MAKING THE COUNCIL THE POLICY-MAKING BODY OF THE CORPS THAT THE COUNCIL MAY INITIALLY SET UP "RELATED" AGENCIES IN DIVISIONS, I.E., NLRB WITH THE FEDERAL LABOR RELATIONS AUTHORITY AND THEN ABOLISH THE DIVISION THEREAFTER. THE COUNCIL DOES HAVE THE AUTHORITY TO CREATE OR ABOLISH DIVISIONS. WHAT PREVENTS THESE FEARS FROM BEING REALIZED?

5. AGENCIES HAVE EXPRESSED CONCERN THAT AN INDEPENDENT CORPS OF ADMINISTRATIVE LAW JUDGES WILL IMPEDE THEIR ABILITY TO CONTROL THEIR CASELOAD AND MANAGE THEIR DOCKETS. RECOGNIZING THE NEED FOR AGENCIES TO BE ABLE TO RELY ON AN EXPEDITIOUS RESOLUTION OF AGENCY ADJUDICATION, HOW WILL THE CORPS RESPOND TO THE NEED OF PARTICULAR AGENCIES CONCERNING PROCEDURAL MATTERS?

6. IS THE CURRENT SYSTEM OF "LOANING" ADMINISTRATIVE LAW JUDGES BETWEEN AGENCIES AN EFFICIENT SYSTEM?

7. HOW ARE CASES ASSIGNED IN AGENCIES? DOES THIS PROCEDURE PROVIDE AN OPPORTUNITY FOR CONTROL OVER AGENCY DECISIONS?

Administrative Law Judge Julius Johnson's Answers to Questions Submitted by Senator Heflin:

1. The ALJ Corps would broaden ALJ expertise by exposing ALJs to a broader range of cases, allowing them to use more of the many types of expertise they gained through their years as litigation attorneys -- helping to prevent ALJ occupational "burnout" associated with repeated work in one narrow area of an agency's adjudications under the present system. This would enable ALJs to be more productive throughout their working lives, and give litigants the benefits of a broader spectrum of judicial expertise than can be found in individual agencies now.

2. Indications are that ALJs are substantially underutilized at a number of agencies, and the Congressional Budget Office is now studying the amount of savings that could be realized.

3. I am not familiar with the Justice Department's testimony during the 99th Congress. Rather than being the "conscience of [one] agency," oriented toward one agency's internal politics, ALJs should be the "conscience of the country" -- just like other federal judges -- impartial arbiters who cannot be swayed by their working for any one agency of the Executive Branch.

4. I see no reason why the ALJ Council would set up and then abolish divisions of the Corps, and I believe that the Council would not take such action unless there were careful study and demonstrated need.

5. We can expect that the ALJ Corps will respond expeditiously to agency concerns about docket management and judicial administration in light of available judicial resources.

6. The current "loaning" system is costly and inefficent due to the high "profits" or "residuals" that accrue to agencies lending their judges to other agencies. See Statement of Hon. Nahum Litt, Chief Administrative Law Judge, U.S. Department of Labor, before the Senate Subcommittee on Administrative Practice and Procedure in 1986, documenting that federal agencies have ALJ borrowing charges of up to 213% of an ALJ's salary, and that some agencies insist on a 50% cash down-payment. Further, the Social Security Administration fully bills all time spent by its support staff, making the cost of using SSA ALJs 200-300% of the cost to DoL of using its own judges.

7. Cases are to be assigned randomly, as practicable, under the Administrative Practice Act. In actual practice, decisions are assigned in accordance with a number of factors, including judicial expertise (i.e., a judge without rate-making experience is less likely to be given a large rate-making case), geographic region, etc. Agencies under the present system have sometimes assigned cases to judges because they were pro-agency, as discussed in Judge Litt's 1986 Administrative Practice and Procedure Subcommittee testimony about the questionable manner of the assignment to himself of air traffic controller firing appeals by the Chief Judge of the Federal Labor Relations Authority (upon being requested to do so by two FLRA board members). A Central Panel avoids such appearances of impropriety by further removing the agency from judge assignment duties.

QUESTIONS OF SENATOR GRASSLEY FOR JUDGE JOHNSON

1. The Department of Labor currently has approximately 100 ALJ's. How many are based in Washington? In what other locations are DOL judges based? How can judges stationed elsewhere help relieve case backlogs as part of a "corps" that is principally based in Washington?

2. In his prepared statement before the subcommittee, the President of the Association of ALJ's stated that it generally takes a newly hired Social Security ALJ "nine or ten months to become productive". How does this "learning curve" compare with that at the Department of Labor?

3. I am interested in reducing heavy caseloads at agencies such as DOL, without a loss in necessary agency expertise at the ALJ level. Thus, with respect to Black Lung Act cases, how could non-DOL judges not familiar with this complicated statute help reduce your agency's backlog?

4. In Black Lung Act cases decided by ALJ's from other agencies, what is the reversal rate at the Benefits Review Board? How does this compare with the reversal rate of cases decided by DOL judges? Compare the length of time taken after the close of the record for a decision between cases heard by DOJ judges with non-DOL judges.

5. Currently, chief ALJ's typically consider the level of difficulty of cases when assigning them to members of their ALJ staffs. Would you agree that this practice is necessary to promote reasoned decisions and efficiency? If so, how can such a practice be accommodated in S. 950?

Administrative Law Judge Julius Johnson's Answers to Questions Submitted By Senator Grassley

1. The Department of Labor has 31 judges in Washington and 68 judges throughout the rest of the United States. All of these judges can make a substantial contribution to eliminating the backlog in adjudicating Black Lung cases. I know of no reason why a judge's contribution should be any less because he or she is not based in Washington, D.C. DoL's offices -- located in Ohio, Pennsylvania, New Jersey, Virginia, Florida, California and Massachusetts -- were carefully located in proximity to hearing locations for Black Lung and Longshore compensation cases. It should be noted that under the ALJ Corps concept, judges would also be located throughout the United States for the convenience of the parties and witnesses, resulting in substantial cost savings to taxpayers now paying the high cost of agency control of ALJs in the form of large expenditures for airline fares and hotel bills now spent by the agencies for their ALJs to fly across the United States to hold hearings in their agencies' jurisdiction. Rather than riding circuit under the present system, ALJs under the Corps could expect to travel less and hear more cases closer to home, realizing judicial economies and cutting expenses for parties whose motion practice and scheduling must now be handled by mail and long distance telephone with often-distant judges. It makes far more sense for Iowans and for all Americans to have ALJs available in their State to hear federal agency adjudications than to fly them in from Washington.

2. In general, I think the "learning curve" for new judges is steeper than suggested, with most new judges "on top" of the "curve" and their jobs no later than six months after starting work.

3. Since administrative law judges are capably assisted by attorney-advisors, law clerks and contract decision writers, providing more judges to hold Black Lung hearings means more decisions can be provided, despite the time it takes to learn Black Lung compensation law. This is because one key "bottleneck" is the number of administrative law judges who can preside at hearings in the coalfields and other places where Black Lung claimants reside. The individual ALJ's ability to write Black Lung decisions increases over time, but the ability to preside at hearings is one skill that he or she already has on the first day on the job, having acquired those skills through other ALJ and litigation work.

4. Due to the fact that only recently were judges from other agencies regularly assigned to help the Labor Department, I am informed that no comparative statistics could yet be compiled on BRB reversal rates. Further, this Office has not seen and does not compile any statistics on BRB reversal rates. Due to the short time that judges from other agencies have been hearing significant numbers of Black Lung cases, and the fact that most have not yet been decided, there are no statistics available on the average time from close of the record to issuance of a Decision and Order by the outside judges. For the past four years, the average time that has elapsed from a judge's receipt of the hearing transcript to issuance of a Decision and Order in Black Lung cases has been 147 days. Please note that there is no information in the computer system on the time elapsed from the date the record closes, but that transcripts are normally received about 30 days after the APA hearing is held.

5. I respectfully disagree with the proposition that assignment of cases on the basis of difficulty is "necessary to promote reasoned decisions and efficiency." This practice is not followed in either state or federal court systems, to my knowledge. ALJs employed by agencies and listed on the Register have all been found qualified to adjudicate administrative law cases after a rigorous selection process. The Corps would have Divisions in which judges would be grouped by experience in substantive adjudication areas.

While the ALJ Corps would certainly listen to the agencies' concerns about judicial expertise, one of the reasons for the proposed ALJ Corps is to cure the discredited agency practice of attempting to select judges to hear cases on the basis of their expected decisions or views. Judges are not juries, and agencies should not be able to subject administrative law judges, in effect, to voir dire in the guise of selecting judges on the basis of their expertise. Further, requiring pre-existing subject matter expertise before a judge can ever hear a case is not always possible, especially as new judges are hired from the Register without prior judicial experience and new areas of the law arise -- like the environmental protection laws, which are of recent origin.

Therefore, it seems to me that the burden should be on the agencies to show business necessity before making expertise the basis of ALJ assignments under the ALJ Corps.

Senator HEFLIN. We have a vote coming up right away on the Senate floor and Senator DeConcini has agreed to chair this subcommittee. We will recess until 9:20, at which time Senator DeConcini will come.

[Recess.]

STATEMENT OF HON. DENNIS DeCONCINI, A U.S. SENATOR FROM THE STATE OF ARIZONA

Senator DECONCINI. The subcommittee will come to order. Thank you for joining us. As the record shows, Senator Heflin has to attend the Select Committee hearings and I will conclude the hearings for him.

Our fourth and final panel is Judge Duane Harves, chief administrative law judge of the Office of Administrative Law Judges in the State of Minnesota, and Margie Mills, president of the American Federation of Home Health Agencies.

We will start with you, Ms. Mills. Your full statement will appear in the record, and if you would summarize it, please.

STATEMENTS OF A PANEL CONSISTING OF MARGIE B. MILLS, PRESIDENT, AMERICAN FEDERATION OF HOME HEALTH AGENCIES, SILVER SPRING, MD; AND DUANE R. HARVES, CHIEF ADMINISTRATIVE LAW JUDGE, OFFICE OF ADMINISTRATIVE LAW JUDGES, STATE OF MINNESOTA, MINNEAPOLIS, MN

Ms. MILLS. Thank you, Mr. Chairman. My name is Margie Mills. I am here today as president of the American Federation of Home Health Agencies. I am also president and chief operations officer of ABC Home Health Service of Brunswick, GA, with Medicare-certified home health agencies in Georgia, Alabama, Florida, and Illinois.

I am accompanied here today by Robert Rosenblum, of Savannah, GA. Mr. Rosenblum was, for 3 years, an attorney adviser for the Office of Hearings and Appeals in Savannah. He has taken a number of cases through the appeals process for my own agencies.

The American Federation of Home Health Agencies is a national association representing Medicare home health agencies and the beneficiaries they serve throughout the country.

We strongly support passage of the Administrative Law Judge Corps Act to ensure that cases arising out of Federal programs will be decided on the merits, free from pressure from this or any other administration.

We will use the Health Care Financing Administration's pending assumption of jurisdiction over the Medicare appeals process as a strong case study to support passage of S. 950.

The situation with Medicare appeals will be repeated in other agencies if not remedied through creation of an independent judge corps. HCFA intends to assume jurisdiction over part B Medicare appeals on October 1 and to take part A appeals from the Social Security Administration in 1988.

The plan, as we understand it, calls for hiring administrative law judges from a list HCFA will maintain, subjecting candidates to a probationary period, centralizing all ALJ's in Baltimore, and conducting the bulk of hearings by telephone.

This scenario holds the potential for further dismantling of the home health benefit, and it goes without saying that hearings by telephone will deprive beneficiaries and providers of their due process rights.

Driven by denial quotas, home health denials have increased nearly 400 percent over the last 3 years. More and more agencies are successfully appealing denials of services that clearly should be covered.

It appears that HCFA's proposal to control the appeals process is motivated by the high rate of reversal of denials by ALJ's. Information we have indicates that the figure is around 90 percent. My own agency has had denials reversed in 29 of 30 cases in 1986 and 1987.

With control over ALJ's, HCFA would be in a position to continue to drive denials at one end of the process through methods such as quotas, and then be able to reward judges who uphold the denials at the other end of the process.

We fear that numerical quotas will also be incorporated into HCFA's evaluation of ALJ's during any probationary period and will be a significant factor in determining pay raises. HCFA's proposal is a very dangerous one. Control of appointment, training, workload, and financial rewards will coerce some ALJ's into towing the HCFA line. The results will be loss of independence for judges and a greatly reduced chance of a fair and impartial hearing for beneficiaries and providers.

Some of those involved in exerting pressure on ALJ's during the Social Security disability tempest 5 years ago would now assume jurisdiction over the Medicare appeals process. Passage of S. 950 would preclude this and prevent similar situations from developing in other Federal agencies.

Thank you for the opportunity to present our testimony. We are prepared to work with you to help secure passage of this vital legislation.

[The prepared statement of Ms. Mills follows:]

TESTIMONY OF

THE AMERICAN FEDERATION OF HOME HEALTH AGENCIES

BY

MARGIE B. MILLS

PRESIDENT

ON

THE ADMINISTRATIVE LAW JUDGE CORPS ACT

SUMMARY

The American Federation of Home Health Agencies strongly supports passage of S.950, to ensure that cases arising from Federal programs will be decided on the merits, without pressure and interference from this or any other administration. We cite the Health Care Financing Administration's prospective assumption of jurisdiction over the Medicare appeals process as a strong case to support passage of S.950. The situation with Medicare appeals will be repeated in other agencies if not remedied through creation of an independent administrative law judge corps.

HCFA intends to assume jurisdiction over Part B Medicare appeals on October 1, and Part A in 1988. The plan apparently calls for hiring ALJs from a list HCFA will maintain, subjecting candidates to a probationary period, centralizing all ALJs in Baltimore, and conducting the bulk of hearings by telephone. We contend that hearings by telephone will deprive beneficiaries and providers of their right of due process.

Home health denials have increased nearly 400 percent over the last three years, and more agencies are appealing denial of services that clearly should be covered. It appears that HCFA's proposal is motivated by the high rate of reversal of denials by ALJs. Anecdotal information indicates that the figure is around 90 percent. With jurisdiction over ALJs, HCFA would be in a position to continue to drive denials at one end of the process, through methods such as denial quotas, and reward ALJs who uphold them at the other end of the process.

Some of those involved in exerting pressure on ALJs during the Social Security disability tempest five years ago would now assume jurisdiction over the Medicare appeals process. Passage of S.950 would preclude this, and prevent similar situations from developing.

The American Federation of Home Health Agencies strongly supports S. 950, "The Administrative Law Judge Corps Act." The judicial function in Federal programs must be kept free from undue political pressures. Issues must be decided on their merits in a fair and impartial proceeding, since Federal programs do not belong to any administration but to the American people whom the programs serve. There is no doubt temptation in any administration to bring pressure to bear on administrative law judges (ALJs) to support the policy interpretations and advance the agenda of that administration. Issues brought to ALJs, however, can literally be matters of life and death. We see this, for instance, in cases involving the Medicare program. The surest way to ensure that issues will be decided on the merits is to create an independent administrative law judge corps that will be free from pressure and interference from outside forces.

No agency should ever be allowed to coopt the appeals process, but that is precisely what is happening with respect to cases involving Medicare. The situation we will outline here clearly illustrates why S.950 should be enacted promptly. Next month, or in another administration, a different agency or program may be targeted.

Last year's Omnibus Budget Reconciliation legislation established a new category of Part B appeals under Medicare. It is the intent of the Health Care Financing Administration (HCFA), which administers the Medicare program, to assume responsibility for Part B appeals on October 1, 1987, and for Part A appeals sometime in early 1988. Currently Medicare appeals are heard by ALJs within the Social Security Administration; these judges also hear other types of cases from programs under the jurisdiction of Social Security.

HCFA plans to hire 42 new ALJs at the GS-14 level to hear cases involving Part A and B benefits, and six ALJs at GS-15 to decide termination and sanction cases. In addition, HCFA will establish its own four member Appeals Board. It is not clear whether the new ALJs would be selected from the pool maintained by the Office of Personnel Management or whether HCFA plans to maintain its own list from which to select judges. If HCFA's intent is to draw up its own list of candidates, that raises the question of whether appointees will be subject to a probationary period, with final appointment contingent upon "satisfactory performance" according to some criteria developed by HCFA.

Medicare officials intend to place all of their ALJs in a single headquarters in Baltimore, where the GS-14 judges will conduct 75 percent or more of Part A and

B benefit cases by telephone, disposing of a projected fifty cases each per month.

(We contend that hearing by telephone is in itself a denial of due process. We know of no other situation where the parties to a proceeding do not have a chance to meet face to face with the judge and to present often complex evidence in person. ALJs must have the opportunity to judge the demeanor and veracity of witnesses and request, on the spot, additional items from the medical record. And beneficiaries especially will suffer if their nurses cannot bring their cases to life before a judge.)

The home health benefit is in a state of disarray. Denials have increased by nearly 400 percent--up to about eight percent--over the last two years. Fiscal intermediaries often do not specify which visits are not being reimbursed and offer no explanation for denials. Home health agencies, which are reimbursed only for cost, are reduced to playing a guessing game as to what will be paid. Providers are not privy to HCFA's internal directives to intermediaries. These policy directives often involve substantive program changes and are at times are in direct conflict with Medicare law and regulations.

Fiscal intermediary actions have been driven by denial quotas mandated by HCFA. Intermediaries not finding say five dollars in denials for every one dollar received for functions such as medical and utilization review and auditing have risked loss of contract. Though some HCFA officials have in the past denied the existence of these quotas, they now say that as of April 1, 1987, they are no longer applying them. We believe that quotas can be resurrected at any time, or may still exist under a different name such as "recovery target."

We also fear that numerical standards will be incorporated into HCFA's evaluation of ALJs during any probationary period, and be weighed as a consideration in determining pay raises. Thus those with the power to set denial quotas for fiscal intermediaries will be in a position to reward judges who uphold the denials. This is a blatant conflict of interest.

Home health agencies increasingly are appealing unfair denials. We are indeed encouraging them to do so. It seems clear that HCFA wants to take control of the appeals process because of the extraordinary rate of successful appeals. We have been informed by one ALJ that where the rate of reversal of denials in his region was 55-60 percent two years ago, it is now around 90 percent. We have heard the same figures from other areas of the country. In the case of my own agency, in 1985, we received eight favorable decisions in eleven cases. In 1986 and thus far this year, we have seen ALJs reverse denials in 29 out of 30 cases. ALJs around the country have been asking providers, "What on earth is going on at HCFA?"

Clearly, any jamming of the system is not the fault of providers, as HCFA would have us believe. HCFA is in a sense blaming the victims rather than trying to ascertain why such a high percentage of intermediary denials are overturned on appeal, and then taking action to remedy the problem.

When the number of successful appeals began to rise several years ago, HCFA responded by denying beneficiaries the right to be represented by providers in the appeals process. This action was designed to discourage appeals and deprive beneficiaries of representation by the advocates who are most familiar with the facts of their case and who have the greatest experience with the hearings and appeals system. In last year's Reconciliation legislation, Congress stepped in and restored the right of beneficiaries to be represented by the provider.

In the appeals process today, ALJs make their decisions on the basis of Medicare law and regulation. If HCFA officials are allowed to assume control, they will be in a position to pressure judges into giving equal or greater weight to subterranean policy statements and directives to intermediaries which may be in conflict with law and regulation.

HCFA proposal is fraught with danger. Control of appointment, training, workload, and financial reward can coerce some ALJs into towing the HCFA line. The result will be loss of decisional independence for judges and a greatly reduced chance of a fair and impartial hearing for beneficiaries and providers.

This situation is illustrative of what can happen to any program if the judicial independence of administrative law judges can be compromised. Some of those who were involved in exerting undue pressure on ALJs five years ago during the Social Security disability tempest would now assume jurisdiction over the Medicare appeals process. We urge you not to allow any agency to use the hearing and appeals process as a tool for ratcheting down a Federal program created by Congress.

We urge swift passage of "The Administrative Law Judge Corps Act" to help prevent officials in this and any future administration from again saying "the law is what we say it is," and attempting through action of questionable legality to control the judges who interpret law and regulation governing Federal programs.

Senator DECONCINI. Thank you very much.

Judge Harves.

STATEMENT OF DUANE R. HARVES

Judge HARVES. Thank you, Mr. Chairman, members of the committee. First of all, let me thank you for the distinct honor of asking me to come to the U.S. Senate to testify before you and to tell you a little bit about the State of Minnesota.

Needless to say, Mr. Chairman, I am here to testify in support of the bill now before you, S. 950. Minnesota created a corps of administrative law judges in 1975. It went into operation in 1976.

At the present time, there are 11 States that have central panel systems of one type or another, or a corps, plus the city of New York and the city of Seattle. There are seven other States which are presently seriously considering and, in fact, I am waiting to hear whether Texas has passed the bill which was pending before them. Legislation is also pending in the States of New York and Pennsylvania and several other States.

Some of the highlights that I believe are important—first of all, Mr. Chairman, a year ago I prepared a report on the first decade of the operation of the Minnesota Office of Administrative Hearings and I would like to have that incorporated into the record.

Senator DECONCINI. Without objection, it will appear in the record.

You have some more time. That was from Ms. Mills. Please continue.

Judge HARVES. Thank you, Mr. Chairman.

I believe that that report will give the members of the committee a full background on how our office was created, how we set it up to respond to the various issues that I have heard again addressed here today—the questions of cost savings, the questions of duplication of services, the questions of expertise.

I thought it was very interesting reading the current version of the bill before you to see the similarities between the way the Office of Administrative Hearings in Minnesota is operated from a procedural standpoint and the other States who also have offices such as this—in fact, the recognition that expertise is an important factor in certain cases.

In fact, we have recognized that where I, such as this bill would do for the chief judges in this corps, have a mandate to attempt to assign persons with expertise in specific subject matters when expertise is necessary. For instance, Mr. Chairman, I have never personally conducted a public utility rate case, but seven of our nine administrative law judges have all conducted those.

We, as in this bill, started with a corps of experts that were grandfathered to our office in 1976, and so we had the built-in expertise. What we have been able to do since then is what we call a cross-fertilization.

We had our first 5-year plan which was simply to get our feet in the water and get ourselves going. Thereafter, we began having the judges move from one division, of which we had—we still have three; we had four for a while and we have combined two so that now all of the judges in our office have conducted OSHA cases, transportation cases, occupational professional licensing cases, environmental cases. We have, as I said, seven people who have a high level of expertise in the public utilities area and are doing some of those hearings which go on for 6 to 9 months.

One of the interesting things that has occurred in Minnesota and which has occurred in the other States that have adopted a panel such as ours is a reduction in staff. In the past 11½ years, we have reduced the staff in our APA section by 54 percent.

We have never laid anybody off in that section, although there were some mandated budget reductions and we did lay off court reporters and went to automatic recording devices and then we contract for court reporting services where it is necessary. But we have had a 54-percent reduction through attrition.

In addition, another thing that we have seen in Minnesota and is seen in the other States is a 30- to 60-percent reduction in the costs of the administrative hearing process. Those are direct costs to the Government and thus to the taxpayers.

In fact, my counterpart in New Jersey, I am sure, has or will be submitting testimony to this committee, and Ron Parker from New Jersey, I believe, will be showing there has been around a 400-percent reduction, or figures in that area, in the State of New Jersey as a result of the creation of a corps of administrative law judges.

I have still been trying to determine why one of the previous speakers is opposed to the bill, and that was the speaker from the NAACP. In 1976 when our office was started, the judges that were brought into our office were all white males.

Our office also does conduct the housing hearings in Minnesota we heard about from Senator Grassley. We have been conducting the various nursing home cases, and we also conduct all the discrimination cases in the State of Minnesota brought under the Minnesota Human Rights Act.

We, too, have to go and do our affirmative action goals like every other agency in government and, in fact, because we have been able to concentrate, we have been able to go out and do recruiting in the minority lawyers groups, the women's groups, the veterans groups, and asked them to assist us in recruiting people to get on the Department of Employee Relations' list of eligible candidates so that we can hire and achieve affirmative action goals.

In fact, Mr. Chairman, at the present time we have met or exceeded all of those goals. In fact, where we had one woman in the office up until about—well, in 1981 there were two females in the office, and we now have 12 of our total of 29 judges are females. We also have two blacks, three Vietnam-era vets, and three handicapped judges.

So we have been able to, because we are an agency concentrating on one thing, concentrate on specific areas such as affirmative action and do some things without having to rely on the other agencies or someone in an agency to be cognizant of those things.

I think those of us who are in the process of judging others' acts of discrimination ought to be leading the way, and we have been able to do that, and I think you would hear the same thing from the chief judges in the other States that have done it. I know them. We meet on an annual basis and I know that their affirmative action goals have been the same, so I feel that is very important.

Senator Grassley earlier had asked a question of Judge Palmer about punitive damage awards, and apparently there are not too many administrative law judges in the Federal system doing it, according to that answer.

Well, we in the States have been awarding those for quite some time, and under the Human Rights Act we have been awarding punitive damages for 12 years. We also do it in several other instances.

Mr. Chairman, I see the red light is on. Let me just summarize my comments by saying that I have put in the report on the first decade of our operation which I believe will respond to the various questions that have come up in how we in the States have handled the question of expertise, the question of costs, the question of travel.

We also have seen the biggest supporters of our office and in the other States—the support has come from the private sector, from the legislature, showing that we have been going out there. We do not have to say that our salary is paid by the agency for whom the hearing is being conducted.

We have been established in the State and the citizens of the State have accepted our office as a truly independent agency where they can get truly a fair hearing, and if we are doing that in the States, Mr. Chairman, what better could you do for the Federal Government and the rest of the taxpayers in this country?

Thank you.

Senator DECONCINI. Thank you very much. Senator Heflin does have some questions which he will ask you to respond to later.

Judge Harves, we did not want to cut you off, but due to time restraints, if you have any other statement you want to submit, the record will remain open for 2 weeks.

Judge HARVES. Thank you, Mr. Chairman. I did not have time to get the written statement prepared.

Senator DECONCINI. I understand.

Judge HARVES. I have spoken to the staff and I will be submitting that in the mail this week.

[Submissions of Judge Harves follows:]

PRESENTATION TO THE UNITED STATES SENATE
July 21, 1987
BY
DUANE R. HARVES
CHIEF ADMINISTRATIVE LAW JUDGE
MINNESOTA OFFICE OF ADMINISTRATIVE HEARINGS

Mr. Chairman, members of the committee. My name is Duane R. Harves. I am the Chief Administrative Law Judge for the Minnesota Office of Administrative Hearings. I am here today to speak in support of the legislation now pending before you which would create a separate federal agency comprised of administrative law judges who are presently employed by the various federal agencies for which they conduct hearings. In support of the proposed legislation, I would like to tell you how the same system has worked in Minnesota. I believe that what has occurred in Minnesota following the creation of a separate hearing agency can be expected to happen on the federal level with the passage of the bill now before you.

The Minnesota Office of Administrative Hearings is a state agency similar to the proposal before you. It was created by the Minnesota Legislature in 1975 to become effective on January 1, 1976, as a totally independent state agency. The legislation creating the office was part of a bill which made major amendments to the Minnesota Administrative Procedure Act. I was appointed as the first Chief Administrative Law Judge by then-Governor and now former-Senator Wendell R. Anderson. I was reappointed to the position on July 1, 1982, by then-Governor and former-Congressman Albert Quie. As you can see, I have been the only Chief Administrative Law Judge for the State of Minnesota since the inception of the office and was responsible for its initial organization, rule adoption, and establishment of its operating policies and procedures.

The Minnesota Office of Administrative Hearings provides Administrative Law Judges to conduct both both rulemaking and adjudicative (contested case) hearings for all state agencies with but two exceptions. The Minnesota Department of Jobs and Training conducts unemployment compensation hearings and utilizes their own hearing referees in a 100% federally funded program. The Minnesota Department of Human Services utilizes its own hearing referees to conduct appeal hearings on the federally funded programs, having been exempted from the APA as a result of a letter from the United States Department of Health, Education and Welfare (now Health and Human Services) in 1976. (That letter threatened to withhold all federal funds unless the Minnesota DHS was allowed to have its own employees conduct the appeal hearings.) Initially, the responsibility for the conduct of workers' compensation hearings was not part of our office. The workers' compensation judges remained at the Minnesota Department of Labor and Industry. In 1981, the Minnesota Legislature transferred the workers' compensation judges to the Office of Administrative Hearings.

The reasons for exempting the unemployment compensation hearings are twofold. First, the agency is presently 100% federally funded and there is some question with respect to the feasibility of intermingling the federal and state funds. Secondly, the initial decision to exempt the unemployment compensation hearings was totally a political decision. Twice in the past two years, legislation has been passed by one or both Houses of the Minnesota

Legislature to transfer the hearings, a bill including the transfer being vetoed in 1986 because it also contained large benefit cuts.

Prior to the creation of the Office of Administrative Hearings, hearing examiners were hired by, officed at, and under the direct control and supervision of the various state agencies. In many instances, state agencies entered into contracts with persons outside of state government to provide hearing examiner services. Obviously, these agencies had control over the number of hearings which would be submitted to these non-employee hearing examiners and thus exercised a certain amount of control over these persons. Prior to January 1, 1976, only one or two of the state agencies had maintained accurate cost data on the hearing process. Therefore, it has been somewhat difficult to determine the actual cost savings but for one or two examples which will be discussed later. Most agencies had hearings conducted by the department heads themselves or by employees who were not trained in the conduct of hearings, and who had many other responsibilities within the agencies. Each agency had its own procedures which required the citizens of the state to obtain copies of different procedural rules depending upon which agency they were appearing before. There was not a single set of procedural rules. Most of these procedural rules were not even codified. Hearings had to be conducted on a "hit and miss" basis due to the unavailability of the department head or the agency employee who was to conduct the hearing. Long delays were the rule rather than the exception. Even when agencies began to hire persons specifically to conduct hearings or to contract with outside persons to conduct the hearings, it created what some felt was an unreasonable expense and, further, led to a lack of procedural uniformity and expertise in the conduct of hearings, delays due to unavailability, and in some instances where employees from one agency were "borrowed" from another, created manpower shortages in the agencies from which the employee was drawn. Because of these and other "fundamental fairness" problems, the Office of Administrative Hearings was created.

In order to insure the independence and neutrality of the office, it was created as a totally independent state agency. The Chief Administrative Law Judge, who serves a six-year term, is the only department head in Minnesota government who is appointed by the Governor but does not serve at the pleasure of the Governor. Once confirmed by the Minnesota Senate, the Chief Administrative Law Judge can be removed only for just cause. Should the Chief Administrative Law Judge leave the position prior to the expiration of the six-year term, his successor would not serve for the remainder of the term but for a full six-year appointment. This process removes the position of Chief Administrative Law Judge from the political process as much as possible. By having the Chief Administrative Law Judge not serving at the pleasure of the Governor, it was felt that the Chief Administrative Law Judge would be insulated from any undue political pressure in terms of assignment of certain persons to hear specific cases, and from pressure to be sure decisions were rendered in certain fashions with predetermined results. It has worked! Having now served under four administrations, not once have I ever received any calls or letters from the Governor or his staff regarding case assignments or the preferred outcome of any case.

Upon commencement of operation on January 1, 1976, the office "inherited" all persons who had been serving as hearing examiners for affected agencies through a transfer or "grandfather" clause in the legislation. These transfers provided the office with initial staff expertise in transportation, public utilities, veterans affairs, securities, insurance laws, and those laws relating to financial institutions. In staffing the balance of the hearing positions, the office sought and found persons having expertise in the environmental area. Thereafter, when a vacancy has occurred, the office has sought persons with more general backgrounds and experience.

While one of the goals of establishing an independent office is to have a corps or panel of judges who are able to conduct any type of hearing, it is also important to achieve and maintain expertise in certain areas of law. In fact, the Minnesota APA provides that the Chief Administrative Law Judge must attempt to use personnel with relevant expertise when assigning cases. During the 1974-75 legislative hearings, state agencies and the public expressed concern that assigning an individual as an Administrative Law Judge who had no knowledge or background in the subject matter would cause delays since all parties would have to "educate" the judge. At the same time, concern was expressed that unless a judge had expertise, decisions might not comply with all of the intricacies of the more complex laws. Given the legislative mandate on expertise and the testimony of the concerned parties, our office was originally organized into three areas for the purpose of case assignments: 1) utilities and transportation law; 2) environmental law; 3) licensing and enforcement actions. The organization of the office into these categories was based upon a review of the number of cases being submitted for hearing in each of the areas. The caseload of the office was evenly divided between those three areas, thus allowing for the best utilization of the expertise where expertise is necessary. At present, with de facto deregulation in certain areas, the environmental and utilities/transportation units have been combined.

The division of the office into these subject areas has been extremely advantageous. Requests for hearings from state agencies seem to fall within one of the three categories and, as stated, each initially comprised approximately one-third of the total number of hearings conducted by the office. Having the specialists on the staff helps in the training of other judges and permits the luxury of assigning less complex cases in the particular subject area to less experienced judges. This is an extremely important aid in the scheduling of cases. Judges from one unit are able to conduct hearings in other units since they can then rely on others for assistance on the expertise questions. Specialized expertise has also resulted in the reduction of the time necessary to complete a hearing. The judge is familiar with the issues in the field of law involved, is able to make decisions without the necessity of preliminary research, and can advise less experienced judges. Following the hearing, we have seen a distinct shortening of the time required for issuing a decision and writing a report as this expertise has developed. In fact, the office goal is that all reports will be issued within 30 days of the close of the hearing record. The average length of time for a case heard under the APA to be issued by our office was 14.6 days following the close of the record for the fiscal year ending June 30, 1987.

Therefore, while it is recognized that expertise is necessary, having all of the judges within one office allows a cross-training of the judges so that the expertise can be shared and developed. This has led us toward the ultimate goal of having a corps of judges who have expertise in all areas and are able to conduct hearings wherever needed. Thus, when scheduling a judge for a road trip, one judge can handle any number of different cases which reduces the costs to all parties concerned and allows us to schedule cases much more rapidly than had previously been the case. It should be noted, however, that when a major case in a specific area of law is received, the cases are assigned to those persons who have the highest degree of expertise in the particular area. These major cases are those which include multiple parties and multiple issues.

While totally accurate data is not available for state agencies we serve, in several instances, having a central and independent office has resulted in a dramatic decrease in the cost of hearings for them. For example, at the time of the establishment of the office, the Minnesota Public Utilities Commission had an annual budget of $400,000 to pay for its "in-house" hearing examiners and court reporters. During the first full year of operation of the Office of Administrative Hearings, the cost to the Public Utilities Commission was $311,330. The next year (fiscal year '78) costs fell to $234.000. For the fiscal year ending June 30, 1982, the cost of hearings to the Public Utilities Commission was $184,219. This should be compared against the $400,000 of previous costs which were in 1975 dollars as compared to 1982 dollars. Similar savings have been made in other agencies such as the Department of Commerce, which had reduced its hearing costs from $120.000 to less than $60,000 within 3 years.

While other expenses have continued to rise during its existence, the office has been able to maintain its budget at approximately the same amount each year. During this same time, salary expenses for the Administrative Law Judges have risen more than two and one-half times. All other salaries - and rent - have also increased dramatically. The obvious savings have been a result of a number of different policies and procedures established by the office and, further, as a result of legislation which the office has pursued which has reduced the number of hearings required to be conducted.

Since the inception of the office on January 1, 1976, the office has reduced its total APA staff by 54%. No Administrative Law Judges have been laid off as a result of the reductions, but we have reduced the number of judges by 40%. Rather, the reduction has occurred, in the Administrative Law Judge classification, by attrition. The other staff reductions have occurred as a result of the establishment of more efficient procedures and utilization of support staff.

The caseload of the office has been reduced by approximately 45% from 1976 to the current fiscal year. About 10% of that reduction is a direct result of budget cutting by the Legislature in 1981 and 1982. Thus, we are looking at a true reduction in the number of cases actually conducted of approximately 35%. This reduction is a direct result of legislation pursued by the office to reduce the number of hearings required to be conducted in the state on an annual basis and from our efforts at alternative dispute resolution. Once all of the hearing responsibilities were under one roof, the office was able to look at all types of hearings which were being conducted by the various state agencies. It was found that there were statutory requirements for contested case hearings when, in fact, there was truly no opposition to the questions raised by the hearing. These hearings primarily involved requests by citizens for permits, licenses or certificates of authority. The office was traveling all over the state of Minnesota conducting hearings where only the person requesting specific authority would show up. This resulted in a high cost to the taxpayers of the state, which has now been dramatically reduced. Legislation has been passed which provides that these matters will not go to hearing unless there is an objection raised to the agency granting the particular permit, license or certificate. Also, if the agency determines to deny the request without a hearing, it must state its reasons for denial in writing and the applicant can then demand a hearing which is then conducted as if no denial had been issued. We have also obtained legislative authority to mediate cases and to try other methods of alternative dispute resolution other than binding arbitration.

Along with the reduction in caseload, the expertise in the conduct of hearings has led to a shortening of the hearing process as previously alluded to. The performance of the office from 1976 to 1981 led the Minnesota Legislature, in 1981, to transfer the responsibility for the adjudication of contested workers' compensation claims from the Minnesota Department of Labor and Industry to the Office of Administrative Hearings. Given the record of the office prior to 1981, the Legislature believed that efficiencies in the system could be achieved by placing the compensation judges within a totally independent office which had but one task, the conduct of administrative hearings and the issuance of decisions. Having now completed six years of this reorganization, we have been able to present reports to the Minnesota Legislature in January of each year indicating that most of the efficiencies which had been hoped for have, in fact, been accomplished. The office has continued to make additional recommendations to the Legislature for procedural changes in the law which would further expedite the adjudication of these contested workers' compensation matters. As a result of the success of the office and of the presentations for change, the Legislature has made major reforms to the Minnesota Workers' Compensation Law, most recently during the 1987 session where a comprehensive procedural reform bill was passed unanimously by both the House and the Senate.

As examples of the efficiencies achieved in the workers' compensation area, in December of 1981 the average length of time for decisions to be issued following a contested hearing was 101 days following the close of the hearing record. This has been reduced to an office-wide average of 30 days for the fiscal year just ended. With respect to the 75% of the workers' compensation cases which are settled each year, we had found that the average length of time for a judge to review and issue an award following receipt of a stipulated settlement was 43.47 days. For the fiscal year just ended, the average length of time for the judges to issue those awards was 4 calendar days following receipt of the stipulation. Finally, in 1981 when the transfer occurred, each judge had an average backlog of 15 cases which they had heard and which were waiting for a decision, more than half of which were cases wherein the record had been closed for more than 60 days. As of the end of June of 1987, the average backlog, per judge, was 6.9 cases.

An interesting and important fact to point out is in the area of affirmative action. The judges transferred to the office in 1976 were all white males. In 1981, the workers' compensation judges transferred included only one female, one oriental, and no other protected classes. Through active recruitment through women and minority groups, we have been able to achieve our affirmative action goals. Of our present full-time staff of 38 judges, we now have two Viet-Nam era veterans, three judges who have handicaps, two blacks and ten females. Having an independent agency allows us the ability and freedom to recruit and appoint qualified individuals to the positions instead of having to rely on some higher authority to achieve the goals. Similar results and achievements have occurred in the other central panel states. (Our percentage of "protected class" professionals would be even higher but for one retirement and three judges moving on to higher level appointments within government.)

In conclusion, the adoption of a central panel system in Minnesota has resulted in a more efficient, cost-effective administrative hearing process, which guarantees the citizens of the state a full and fair administrative hearing. Costs have dropped dramatically and cases can now be both heard and decided more efficiently from both a time and cost viewpoint. An intangible, yet probably more important aspect of the creation of such a system has been both the actual and the appearance of fairness and independence as perceived by the taxpayers in the state of Minnesota who must appear before state agencies in administrative hearings. No longer are they faced with a hearing process wherein the Administrative Law Judge is an employee of the same agency which has previously denied some request by the individual with the exception of the two agencies previously discussed. The quality of the justice of the administrative process is judged, by the citizens of this country, not only on the actual hearing process and the results but by the perception of fairness in the eyes of the public. We believe that the creation of a central panel system in the state of Minnesota has created a system which has resulted not only in a quality administrative process but has come to be accepted by the public as a system wherein a full and fair hearing can be obtained in a cost effective and timely manner.

Mr. Chairman, members of the committee, while it may be obvious that I have a certain bias toward the central panel or corps system, the data I have presented here today should speak for itself. What we have in Minnesota and what other states and the cities of New York and Seattle have in varying degrees is right for the people of this country, both from the view of fundamental fairness in the administrative adjudication of their rights and from the potential savings in both time and dollars. I strongly urge this committee and members of the United States Congress to move rapidly in passage of this legislation.

Thank you.

THE
STATE OF MINNESOTA

OFFICE OF ADMINISTRATIVE HEARINGS

L'ETOILE DU NORD
1858

1975 — 1985

A REPORT ON THE FIRST DECADE

THE
STATE OF MINNESOTA
OFFICE OF
ADMINISTRATIVE HEARINGS
1975 - 1985
A REPORT ON THE FIRST DECADE

Duane R. Harves
Chief Administrative Law Judge

January 1986

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PREFACE

On December 31, 1985, the Minnesota Office of Administrative Hearings completed its tenth full year of operation. Those ten years followed five months of organizational preparation during 1975.

The office, independent from any other state agency and charged with the task of conducting fair and impartial hearings for a multiplicity of agencies, was one of the first of its kind to be created across the country, preceded only by California (1946), Massachusetts (1974), Tennessee (1974) and Florida (1974). There are now five more states which have what has come to be known as a central panel system for administrative hearings: Colorado, New Jersey, Washington, Missouri and, effective January 1, 1986, North Carolina. Sixteen other states and the federal government are in various stages of consideration of the establishment of a similar agency.

During the past ten years, there have been many changes in the field of administrative practice and procedures. These changes have occurred due to judicial decisions and legislative changes across the country and in Minnesota. As an example, the Minnesota Legislature has amended the Administrative Procedure Act (Minn. Stat. Ch. 14) every year since 1974, the only exception being 1978. As this report was being prepared, several Minnesota legislative committees were considering further amendments for enactment during the 1986 Legislative Session.

The purposes of this report are to provide a history of the Minnesota Administrative Procedure Act and its various amendments, to provide information on how the Minnesota office was initially organized and how it has operated, and to provide some perspective for the future, including recommendations for changes. It is the hope of this writer that this report will provide information and assistance not only to the Minnesota Legislature in its review of the present law, but to other jurisdictions which may be considering adoption of a similar agency.

It may appear to the reader that this report is a bit of "horn blowing" by the office. That perception is probably accurate as it is also intended to be a tribute to the many dedicated and professional employees of the office who have worked very hard under severe deadlines and tight fiscal constraints to achieve the successes chronicled in this report.

Chapter 1

Introduction and Historical Perspective

A. Introduction.

During the 1975 Legislative Session, the Minnesota Legislature passed major amendments to the Minnesota Administrative Procedure Act (APA) which included the creation of an independent agency which has, as its sole function, the conduct of administrative hearings. The agency, first called the Office of Hearing Examiners and now called the Office of Administrative Hearings (OAH), became effective on January 1, 1976.[1] It is the intent of this report to briefly review the history of the Minnesota APA prior to the 1975 changes, the legislative concerns which led to the 1975 APA amendments, the 1975 amendments themselves, the initial steps taken to implement the amendments and organize the OAH, legislative amendments to the APA since 1975, a review of the operation of the OAH over the past decade and a view to the future for both the OAH and the APA.

B. Historical Perspective

The current APA can trace its origin to 1941 when the Legislature passed what came to be codified as Minnesota Statutes 15.06(5) (1941). At that time, the law allowed the commissioner or head of any agency to prescribe rules and regulations for the conduct of the agency unless expressly forbidden by law. The only statutory requirement applicable to all rules was that they be "not inconsistent with law". The only uniform statutory command in the rule promulgation process was that any rules affecting persons other than the agency "be filed with the Secretary of State".[2]

During the Fifty-Third Session of the Minnesota Legislature in 1945, the first APA, as such, was passed into law.[3] Under the terms of that act, in order to promulgate rules or regulations agencies were required to hold a public hearing after first giving thirty days notice to interested persons who registered with the Secretary of State. The agencies were required to submit the rules to the Attorney General, with reasons for the rules; the Attorney General was required to approve or disapprove the rules based on a form and legality review; and the approved rules became effective thirty days after filing with the Secretary of State.[4] During the same Legislative Session, requirements for the publication and distribution of all administrative rules and regulations were also passed.[5]

The 1945 Act was substantially amended in 1957.[6] The 1957 Act was the first comprehensive APA in Minnesota which also added a requirement that adopted rules and regulations "be based upon a showing of need for the rule".[7] Another significant change, and major difference between the 1945 and 1957 acts involved the latter's attention to "contested cases", i.e., matters relating to the quasi-judicial functions of administrative agencies.[8]

Subsequent to 1957 and prior to 1975, the APA was amended several times. The Commissioner of Insurance, historically exempted from the rulemaking provisions of the APA, was placed under its requirements in 1961.[9] All of the health related professional and regulatory examining and licensing boards were placed under the APA rulemaking requirements in 1963.[10] In that same year, rules were required to be filed with the Commissioner of Administration as well as with the Secretary of State; rules established by state agencies not defined as within the APA's coverage would be without the force and effect of law unless filed in accordance with the APA; and the Commissioner of Administration was required to annually publish all administrative rules and regulations.[11] The Workmen's Compensation Commission was exempted from the APA in 1969.[12] In 1974, the State Register was established with the requirement that all notices of intended action, hearing notices and approved rules were to be published in it.[13]

During the period from the mid-sixties to the mid-seventies, the Legislature was also passing laws creating the right to an administrative hearing in many more areas of the law which required compliance with the contested case provisions of the APA. At the same time, the Legislature began to recognize the need for agency heads to be able to delegate the responsibility for conducting the hearings to other agency personnel by creating and specifically authorizing the use of hearing examiners within the agencies. In some instances, agencies were required to use hearing examiners to conduct the hearing with the added requirement that the hearing examiners could not be employees of the agency. Examples of legislation discussed above include:

1. The Public Service Commission was authorized to "hire employees as may be necessary" including hearing officers and court reporters in 1967.[14]

2. The Minnesota Department of Commerce was first authorized to hire hearing examiners in 1969 and to utilize them "where an appointive authority directs that the matter be heard by a hearing examiner."[15]

3. The Commissioner of the Minnesota Department of Human Rights was authorized to hire hearing examiners from outside of the agency and was required to assign discrimination hearings to them, for final determination, in 1967.[16]

4. In 1973, the authority for enforcement of certain nursing home safety and health laws and rules was transferred from the Commissioner of Public Welfare to the State Board of Health. Hearings on correction orders were required to be conducted by a hearing officer "who shall not be an employee of the state board of health."[17]

5. Also in 1973, the Occupational Safety and Health Review Commission was authorized to conduct hearings on appeals from citations of the Commissioner of Labor and Industry or to appoint hearing examiners to conduct the hearings.[18]

6. Numerous new environmental laws, requiring various hearings, were passed during the 1960's and 1970's, including the creation of the Minnesota Pollution Control agency in 1967.[19]

Thus, in the area of contested cases, the Legislature had been recognizing the need to provide due process rights to the citizens of the state together with the need to allow agencies to operate more efficiently and expeditiously when adjudicating these cases. Finally, the necessity of a totally impartial fact-finder and decisionmaker was recognized where an agency was viewed as being both the strict enforcer and prosecutor under certain areas of the law.

With this background, the Minnesota Legislature began its comprehensive review of the APA which led to the 1975 amendments.

Chapter 2

The 1974-1975 Amendments

During the 1974 Legislative Session, Representative William "Bill" Quirin, Chairman of the House Governmental Operations Committee and his counterpart, Senator Edward Gearty, Chairman of the Senate Governmental Operations Committee, agreed that a joint House/Senate review of the APA would be appropriate.[20] A draft of proposed changes was prepared for dissemination and comment and was sent especially to all state agencies.[21] The Administrative Law Section of the Minnesota Bar Association was also requested to participate in the review and comment through its then-chairman William Brooks. Mr. Brooks had been pursuing the concept of a separate and independent agency of hearing examiners since approximately 1964 when he was a member of the Attorney General's staff.[22] Other very active, supportive participants in the process included representatives of Governor Wendell Anderson's staff, the Minnesota Association of Commerce and Industry through its representative James "Ted" Shields, Attorney General Warren Spannus' office through his representative Assistant Attorney General J. Michael Miles, and former legislator (who had authored APA legislation during the 1950's) Peter S. Popovich.[23] The unenvious task of preparing the many drafts of the proposed changes, soliciting and reviewing written comments, scheduling of hearings and responding to innumerable requests for information during this period fell on the shoulders of James Nobles[24], from the House Research staff and Thomas J. Triplett[25] of the Senate Counsel's staff.[26]

Upon receipt of the draft of proposed changes, which included the removal of all exemptions from the APA, the state agencies were requested to submit samples of their agency guidelines, interpretive opinions and policy statements. They were also required to come forward with any and all reasons why their agency, or specific programs within their agency should be exempted from the APA. These written responses were compiled by Messrs. Nobles and Triplett and presented to the members of the joint committee. Agencies also presented oral testimony at the hearings.[27]

The major impetus to changing the APA was what was perceived to be violations of the rulemaking provisions of the APA. The joint committee discovered numerous instances of the issuance of agency guidelines or policy statements which had been issued by agencies without any public participation in the process. These guidelines and policy statements were then being enforced by the agency as though they were properly adopted rules having the force and effect of law. Examples included:

1. On May 17, 1971, the Department of Public Welfare adopted a statement of "official policy" on the performance of prefrontal lobotomies on patients in state hospitals.

2. In November 1973, the Board of Education published its "Guidelines for the Collection, Maintenance and Release of Pupil Records" which defined limitations on the accessibility of certain personal student files.

3. On November 20, 1973, the State College Board issued its "Operating Procedure 19" which permitted the consumption of alcoholic beverages in residence halls and in other academic buildings for "special occasions".

4. On June 7, 1974, the Department of Revenue, Income Tax Division, issued a memo to its tax examiners relating to rent credits specifying that tenants who rent from relatives must have entered into the lease arrangement at arms length in order to be eligible for the credit.[28]

As a result of the hearings, major changes were made to the APA by the 1974 and 1975 Legislatures. Among the more significant changes were the following:

1. A Legislative Commission to Review Administrative Rules (LCRAR), to be comprised of five members of the Senate and five members of the House was created in 1974. The LCRAR was given authority to review agency rules and to suspend the rules if the LCRAR found it appropriate to do so. Thereafter, the rules were to remain suspended until the next regular legislative session where a bill permanently repealing the rules was required to be passed by both bodies and signed by the Governor or the suspended rules would become effective again.[29] (This provision remains in effect today with very minor changes having been made.[30])

2. The definition of rule was changed by deleting the word "regulation", which was a redundancy and confusing, and by broadening the definition to ensure that it included "every agency statement of general applicability and future effect", which was intended to include all agency guidelines and policy statements.[31]

3. The Office of Hearing Examiners was created as an independent agency within the executive branch of government to be headed by a chief hearing examiner (now called the chief administrative law judge).[32]

4. The chief hearing examiner was given authority to adopt procedural rules for both rulemaking and contested case hearings which rules were to supersede all other agencies' rules which may be in conflict.[33]

5. All rulemaking hearings were required to be conducted by a hearing examiner (now called an administrative law judge) who could, subject to review by the chief hearing examiner, effectively stop rules from being adopted under certain circumstances. All rules were required to be adopted only after a hearing was conducted.[34]

6. All hearings falling within the APA definition of "contested case" were required to be conducted by a hearing examiner who was to prepare a recommended action to the agency, except where other laws required the hearing examiner's report to have finality.[35]

7. Exemptions from the rulemaking provisions of the APA were provided for rules relating solely to the internal management of an agency, rules of the game and fish division of the Department of Natural Resources, rules relating to weight limitations on the use of highways, and opinions of the Attorney General.[36]

8. While there was only one specific exemption from the definition of "contested case" in the APA, several exemptions from the APA itself were maintained. These included any agency having less than statewide jurisdiction (i.e. the Metropolitan Council), agencies in the legislative or judicial branches, certain emergency powers of the Governor, the Minnesota Corrections Authority and Pardon Board, the Department of

Employment Services (i.e. unemployment compensation matters), the Director of Mediation Services, the Workers' Compensation Division of the Department of Labor and Industry, and the department of military affairs. The only specific exemption from the contested case provisions was for the Minnesota Municipal Commission.[37]

Chapter 3

The Office of Administrative Hearings

As briefly stated in Chapter 2, the 1975 amendments to the APA created the Office of Hearing Examiners. It was established as an independent agency within the executive branch of government and charged with the responsibility of the conduct of all administrative hearings required to be conducted pursuant to the APA.[38]

In a further effort to ensure the independence of the office and to remove it, as much as possible, from any political pressures, two significant sections were included. First, at a time when the Legislature had been reducing agency head terms of office from six to four years to be coterminous with that of the Governor, the position of the chief hearing examiner was created to be appointed by the Governor, with the advice and consent of the Senate, for a six-year term ending on June 30th of the sixth calendar year following the appointment. Second, all persons appointed as hearing examiners were to be in the classified or civil service system, were required to be free of any political or economic association which would impair their ability to function in a fair and impartial manner and were required to be "learned in the law" if conducting contested case hearings.[39] These provisions remain in the law today.

In response to the critics who feared that there would be a loss of expertise and thus the creation of delays in the process, the legislation included a "grandfather clause" which mandated that all persons then serving as hearing examiners in state agencies and who were otherwise eligible for appointment were transferred to the office if their agency was not exempt.[40] Additionally, a requirement was added which directs the chief hearing examiner, when making case assignments, to assign persons with expertise in the subject matter of the hearing whenever possible.[41]

Because costs of the administrative process were of concern, the office was given an initial appropriation of only $167,000 to be used during the organizational phase of its operation and as "start-up" funds once the effective date occurred.[42] Thereafter, all funding is to be from a direct charge to the agency for which a hearing is being conducted.[43] A further cost-related provision allows the chief hearing examiner to contract with qualified persons to serve as hearing examiners when regularly appointed hearing examiners are not available.[44] This latter provision was to enable the office to hire full-time staff to cover the normal hearing schedule rather than hiring staff to cover the peak periods and having less than a full caseload at other times.

Prior to 1975, all agencies had their own procedural rules, most of which were similar to model rules proposed by the Attorney General, but all having their own unique sections. The 1975 Act required the chief hearing examiner to adopt procedural rules for both rulemaking and contested case hearings.[45] Once adopted, these rules superseded any other agency's rules which were in conflict. This provision was a response to the complaints that a multiplicity of procedural rules existed which required parties to purchase and be familiar with different procedural rules for each agency.

The act also provided specific authority to the chief hearing examiner to utilize court reporters to keep the record at all hearings or to use audio magnetic recording devices if deemed appropriate. Discretion was given to the chief hearing examiner to maintain a staff of court reporters.[46]

Finally, the act, passed in the late spring of 1975, required the Governor to appoint the chief hearing examiner by July 31, 1975. The rest of the Act's requirements became effective on January 1, 1976.[47] This was to provide sufficient time for the appointee to organize the office, adopt the procedural rules and to give the various state agencies time to prepare for the required changes. Governor Wendell Anderson appointed this writer as acting chief hearing examiner on July 25, 1975.

As will be discussed in Chapter 6, the title of the office was changed to the Office of Administrative Hearings by the enactment of 1980 Minn. Laws, Ch. 615. While the "official" reasons for the title change was that it would be much more descriptive of the work actually performed by the office, other reasons were also given. The primary reason for the change, at least from the perspective of the personnel of the office, was the fact that the public many times assumed that our office had something to do with impairments in hearing or that we regulated hearing aid dealers. Adding to the confusion was the fact that two of the three floors of the building housing our office were occupied by Minnesota Services for the Blind. The change in title effectively solved this misconception problem.

Chapter 4

Organizing the Office

Although the official appointment to the position of chief hearing examiner was made on July 25, 1975, on the previous day the Governor had informed persons of his selection and had requested the Commissioner of Administration to assist the new appointee in the organization of the office. That Commissioner, Richard Brubacher, arranged a meeting for the chief hearing examiner with the directors of several divisions at the Department of Administration. That meeting was held on the day before the official appointment by the Governor. The purpose of the meeting was to introduce the appointee to the various division directors and to provide immediate assistance in a number of areas. The most obvious and pressing needs were to find office space for the appointee, office furniture, and to have telephone equipment installed. While under normal circumstances such tasks would take anywhere from two to three weeks, within 24 hours the Commissioner of Administration had found space for the chief hearing examiner to sublease from the Minnesota County Attorney's Council, which was located one block from the State Capitol. At the same time, arrangements were made to temporarily rent furniture from the same council and the normal "red tape" was cut so that at 8:00 a.m. on July 25, 1975, the telephone lines at the new Office of Hearing Examiners were installed and working. At the same time, the Commissioner provided direct assistance so that the chief hearing examiner could obtain immediate office supplies.

Besides enlisting the aid of the Commissioner of Administration, the Governor also requested the Commissioner of Personnel to provide immediate assistance to the chief hearing examiner in any and all personnel related matters. Michael C. O'Donnell, then acting commissioner of personnel, directed his staff to provide whatever assistance was necessary and to do so in an expedited fashion. He, like Commissioner Brubacher, set up an immediate meeting with the directors of the various divisions at the department who then proceeded to assist the chief hearing examiner in the preparation and completion of all paper work necessary to the establishment of the position and continued this assistance on an "as needed" basis.

There can be no doubt that without the cooperation of Commissioners Brubacher and O'Donnell, the directives to their staffs to provide immediate assistance, and the able assistance of those staff persons too numerous to mention, the implementation of the 1975 APA amendments, by January 1, 1976, would not have occurred.

One of the initial tasks in organizing any new agency is to determine the number of personnel which will be required to carry out and implement the provisions of the enabling legislation. In order to accomplish this task, it was necessary to obtain information and data from every agency of state government as it related to the conduct of administrative hearings which had been conducted in the past, along with estimates for the number and length of hearings which were anticipated to be conducted after January 1, 1976. In order to ascertain these numbers, each agency was contacted by telephone to set up an appointment for the chief hearing examiner to meet with the department head or designee and appropriate staff persons who could provide answers to the questions relating to hearings. Because the Governor had issued a directive relating to full cooperation in the establishment of the new office, all state agencies were well prepared for these meetings and provided what information they had available. At the same time, to verify the information which was being obtained from the agencies, the Attorney General's office was asked to survey all of its personnel, who were requested to go back through their records to determine the number of hearings they had been involved with for all of the agencies. The numbers obtained from the agencies were very close to the numbers obtained from the Attorney General's office.

After approximately two months of meetings, during which time the first draft of procedural rules were also being prepared and published, it was determined that the office could anticipate approximately 2,000 hearings each year. After attempting to analyze the length of the hearings involved, the California Office of Administrative Hearings, an office similar in scope, was consulted to compare the caseload numbers, anticipated hours per hearing, and an organizational structure. Upon obtaining information from that office, the Department of Personnel was consulted and it was determined that the office should be initially staffed with a total complement of 35 positions, which was to include the chief hearing examiner, a deputy chief hearing examiner, 15 hearing examiners, 10 court reporters, an administrative assistant, and seven additional support staff positions to provide typing support for the hearing examiners, receptionist responsibilities, a financial clerk to be responsible for the billing of agencies, and typists to provide transcriptions of tape recorded hearings. Once these numbers had been established and approved by the Department of Personnel, it was necessary to draft position descriptions for each of the proposed positions. Again, the staff of the Department of Personnel provided not only input for the position descriptions but assisted in the actual drafting of the position descriptions in order to expedite the process. Once the position descriptions were completed and approved, it was necessary to publish the vacant positions in the bulletin in order that persons could submit applications for consideration for hire.

As indicated earlier, the 1975 legislation provided for an automatic transfer to the office of those persons presently serving in the position of hearing examiner in other state agencies. The Commissioner of Personnel assisted in locating these persons. Meetings were held with these individuals shortly after the appointment of the chief hearing examiner and continued until the transfer. It was established that five persons from the Public Service Commission and one from the Minnesota Department of Commerce were eligible for transfer. At the same time, as the office was intending to maintain a court reporter system, persons presently serving as court reporters in state service were not automatically transferred by the law but, rather, were eligible for appointment to the positions if they applied. Therefore, meetings were also held with these individuals in order to inform them of the intended policies of the newly created agency so they might be able to make their decision on applying for positions.

The hiring of court reporters led to some controversy . In the past, court reporters at the Public Service Commission had been allowed to keep the proceeds from the sale of all transcripts they had prepared and which had been sold to the public. As the newly-created agency's enabling legislation provided that the fees for all services were to go to the office revolving account, it was the established policy of the agency that any fees for the transcription of the record of any hearing would go to the revolving account in the state treasury and not to the individual court reporters, who were classified employees of the state. As a result of this provision, several of the court reporters at the Public Service Commission chose to seek other non-state employment or to transfer to the Department of Labor and Industry, Workers' Compensation Division, where the court reporters were allowed to keep the proceeds from the sale of transcripts from those hearings.

Enabling legislation specifically authorized the chief hearing examiner to utilize audio magnetic recording devices for hearings where it was deemed appropriate. During 1975, the first four-track audio magnetic hearing recorders were available on the market. Because it was assumed that the majority of the hearings would utilize court reporters and because the four-track systems were untested in terms of reliability, a limited number of the four-track systems were purchased. Again, the staff of the Department of Administration provided able assistance in preparing and expediting the necessary documents which allowed the office to obtain equipment prior to January 1, 1976.

One of the factors that most people fail to think about when a new agency is created is the cost of the purchase of desks, chairs, typewriters and other necessary reusable office equipment, as well as office supplies. The purchase of office equipment was expedited through the Procurement Division of the Department of Administration. A more difficult task was trying to determine the amount of office supplies which would be necessary. It did not appear that anyone within state government had any usable data on exactly how many paper clips, pens, pencils, legal pads, rulers, scissors, staples, etc., are used by an employee in a specific position in state government. Therefore, the ordering of such mundane yet absolutely necessary supplies became a real guessing game. At the same time, having a legally trained person trying to figure out exactly what type of pencils, pens, and other secretarial supplies were most appropriate became almost humorous. Luckily, the first employee hired by the chief hearing examiner was an administrative secretary who had previously served in the same position at the Department of Commerce and who had much experience in not only dealing with the necessity for support staff supplies but in providing secretarial services directly to the new appointee. Sandra Haven had previously worked as a secretary to the newly-appointed chief hearing examiner while he worked at the Department of Commerce, and also had experience as the administrative secretary to the Chairman of the Minnesota Department of Commerce prior to her transfer to the Office of Hearing Examiners. Her experience, and thereafter advice and assistance, in the organization of the newly-created office proved to be invaluable.

One would think that obtaining office space for a newly-created state agency would be an easy task given the usual "glut" of office space available and the desirability of a state agency as a tenant. However, given only five months to have the facilities available and the number of private offices necessary, finding and designing office space was one of the more difficult tasks in the organization of the office. It was assumed that finding office space would be much easier but we had begun looking for the space immediately. Several locations were found and designs were drawn for the office. However, for one reason or another, the proposed lessors dropped from consideration when faced with a January 1, 1976, deadline. Once again, the Department of Administration, Real Estate Management Division, provided able assistance and, eventually, adequate space at a very nominal charge was located within the city of St. Paul. However, it was not until November 11, 1975, that the space was found. Leases had to be prepared and signed before any work could be accomplished.

Once the office space had been located, equipment and supplies ordered and procedural rules adopted, the task of filling vacant positions commenced. Interviews were held during the month of November of 1975. When hiring the first hearing examiners, an attempt was made to find persons with expertise in different areas of the law so that the office could commence its operation with a wide variety of expertise. This proved to be a difficult task in one area but the office was able to find an individual with an excellent background in environmental law to assist in establishing an environmental unit within the office. Probably due to the minimal salaries which were available at the time, the number of applicants for the positions was considerably less than had been anticipated. However, the quality of the applicants was at an extremely high level and gave the chief hearing examiner a sufficient number of persons to choose from.

While it was the intent to organize the office into units for the purpose of supervision and for the purpose of maintaining or establishing expertise in certain subject matters, it was determined that with the exception of the environmental law area, the chief hearing examiner would personally supervise all individuals until such time as appointments to the supervisory positions could be determined. Therefore, the initial organizational structure was not implemented until sometime after the office had gained some experience.

In hiring individuals to the hearing examiner positions, it was anticipated that the number of hearings forecasted by the agencies was correct. Unfortunately, when providing data on the anticipated hearings, the numbers which had been provided by the agencies were somewhat inflated which created immediate problems. Using the usual 20-20 hindsight, where the office hired 14 full-time and one part-time hearing examiner, no more than ten hearing examiners should have been initially hired, leaving the balance of the positions vacant to be filled as the need would arise. As an example, the position of assistant chief hearing examiner was not initially filled and eventually that position was cancelled. Three court reporter positions were not initially filled and, as will be seen later, were never filled once a time/cost study had been accomplished.

The office began receiving its first requests for the assignment of hearing examiners during the month of December of 1975. Because there were six hearing examiners who were to be transferred to the office who had experience, the office was able to accommodate these requests as they were made. Likewise, we were able to project into the future and assign hearings to persons who were to be newly-hired on January 1, anticipating that they would be fully trained by the time their hearings were to be conducted. Thus, the actual receipt of requests for hearings, assignment of hearing examiners, and calendaring and docketing procedures were implemented prior to the effective date of the office. Fortunately, prior to the requests being received, an office policy and procedures manual had been prepared which established both a billing system and a calendaring procedure.

The adoption of the procedural rules was accomplished through the assistance of George Beck, a hearing examiner at the Department of Commerce who was to be transferred to the office; Howard L. Kaibel, Jr., the first hearing examiner to be hired by the office; J. Michael Miles, Assistant Attorney General assigned to the Office of Hearing Examiners; Ted Shields of the Minnesota Association of Commerce and Industry; and William Brooks, Chairman of the Administrative Law Section of the Minnesota Bar Association as well as other members of that association. These persons provided assistance in discussions of what the rules should contain, what they should look like, and how they should be proposed, as well as providing valuable comments on the various drafts. The first hearing was held in the late fall, which led to changes in the rules. The comments received at the hearing also led to the office proposing more substantial amendments to the rules at a second rulemaking proceeding conducted in December.

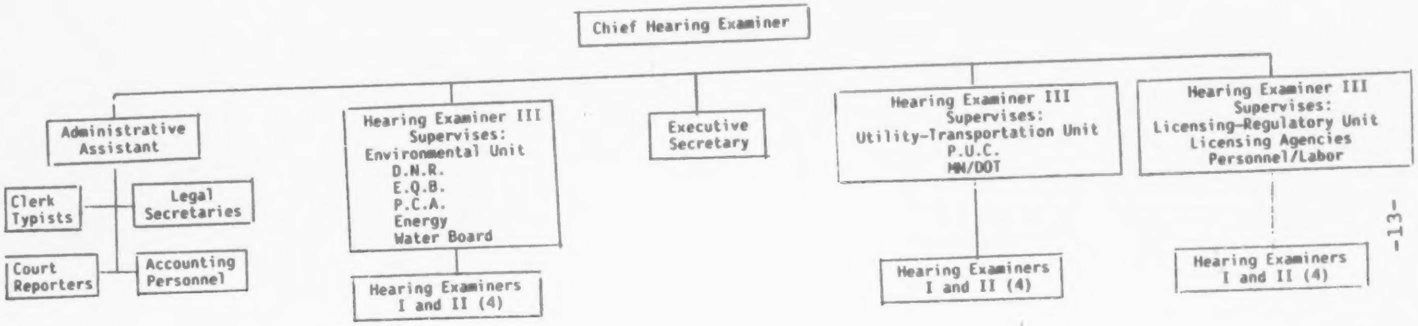
The first rulemaking hearing was attended by a large number of persons interested in the administrative process. The largest number of persons in attendance represented agencies. The other persons in attendance were members of the Administrative Law Section of the Bar Association and other representatives of associations with a high degree of interest in the administrative process. At the second rulemaking hearing where amendments to the initial rules were proposed, a much smaller number of persons attended due to the limited scope of the proposed amendments. In both proceedings, all participants came prepared to suggest modifications or other changes to the rules to make them more workable and easier to understand. The initial rules were adopted and effective prior to January 1, 1976.

The initial organizational structure of the Office of Hearing Examiners was as indicated in the chart at the end of this chapter.

From the initial appropriation of $167,000, $86,134.56 was expended prior to January 1, 1976, during the organizational phase of the office. This left $80,865.44 to begin operations on January 1. The breakdown of the organizational costs is as follows:

A. Furniture		
1. Desks	$11,472.92	
2. Chairs	7,382.28	
3. Filing Cabinets, Shelving, Bookcases	3,821.00	
4. Credenzas and Tables	3,350.02	
5. Miscellaneous	1,946.45	
6. (Less Transfer at Later Date)	(492.45)	
		$27,480.22
B. Equipment		
1. Typewriters	$ 5,008.50	
2. Dictation Equipment	6,472.50	
3. Hearing Recorders	14,583.15	
4. Office Machines	338.92	
5. (Less Later Transfer)	(1,000.00)	
		$25,403.07
C. Office Set-Up Supply Expenditure		
1. General Supplies	$ 2,542.00	
2. Law Books	7,497.00	
3. Telephone Installation	848.00	
		$10,887.00
D. Operational Costs - July to December 1985		
1. Salaries	$19,197.27	
2. Miscellaneous Operational Expenses (Rent, supplies, telephones, etc.)	3,167.00	
		$22,364.27
GRAND TOTAL		$86,134.56

MINNESOTA OFFICE OF ADMINISTRATIVE HEARINGS
ORGANIZATION STRUCTURE
AS OF JANUARY 1, 1976


Chief Hearing Examiner
Administrative Assistant
Clerk Typists
Legal Secretaries
Court Reporters
Accounting Personnel
Hearing Examiner III Supervises: Environmental Unit D.N.R. E.Q.B. P.C.A. Energy Water Board
Hearing Examiners I and II (4)
Executive Secretary
Hearing Examiner III Supervises: Utility-Transportation Unit P.U.C. MN/DOT
Hearing Examiners I and II (4)
Hearing Examiner III Supervises: Licensing-Regulatory Unit Licensing Agencies Personnel/Labor
Hearing Examiners I and II (4)

Chapter 5

The First Year

On January 2, 1976, the office opened its doors for business. The first weeks, as was anticipated, were a bit chaotic. On January 2, only two telephone lines had been installed because our telephone "order" had somehow gotten delayed in processing. This problem was quickly solved after the Chairman of the Public Service Commission, Karl Rolvaag, found it impossible to get through to our office to schedule hearings. One call from the PSC led Northwestern Bell Telephone Company to authorize overtime to employees for the first time in eighteen months. By the evening of January 4, all phone lines were in and working.

Another problem was furniture. It was not fully delivered until after the first week. In the interim, the employees shared what desks we had available, everyone taking the initial "glitches" in good stride.

On January 2 and 3, the office held orientation sessions for the employees. These sessions included going through the office policy and procedures manual and the newly adopted procedural rules. We invited representatives of the Department of Personnel to participate. They went through, in great detail, the personnel laws and rules which proved to be invaluable to our employees. Another very valuable part of the initial orientation was given by a representative of the insurance agency which was responsible for all employee insurance. A representative of the State Capitol Credit Union participated by explaining the operation of the credit union and answering any and all questions. All of these persons provided valuable information to the employees and responded to questions which the office administration would otherwise have had to answer on a case-by-case basis.

For the purpose of training newly hired hearing examiners with little or no experience, we assigned one experienced hearing examiner to two with less experience. The "rookie" examiners attended hearings conducted by the "veteran" examiner, thereafter asking any questions about the proceedings and discussing the case itself to gain a better understanding of the law which was the subject of the hearing. When the "rookie" examiners conducted their first hearings, the "veteran" sat in on the hearing, took notes, and later prepared a written critique of the proceedings, providing a copy to the chief hearing examiner.

In order to insure uniformity in format and a grammatically correct and understandable work product, prior to the issuance of any hearing examiner's report, it was reviewed by the chief hearing examiner. This review was primarily for the purpose of insuring readability, correct spelling and grammar, and uniformity of format but also was for the purpose of insuring that all reports contained the conclusions of law necessary to reach a decision and that each conclusion was supported by one or more findings of fact. (This pre-issuance review has continued to the present time and is now accomplished by the ALJ supervisors or the Chief ALJ in their absence. It has proven to be a very effective quality control procedure.)

One problem which was evident very early was the misconception, by some, of what constituted a true finding of fact. We found that some training in this regard was necessary and attempted to provide it through this review. Another problem which emerged was the propensity of some examiners to use language in their reports which could be and was viewed by some as demeaning to one party or another. This led to the establishment of a written policy of the office which prohibits the use of language in a report which could be viewed as a "cheap shot" at a party. While some examiners expressed initial concern over the policy, compliance was obtained and the policy remains in effect at this time.

As alluded to in the previous chapter, when providing data on the number of anticipated hearings, agencies had inflated their numbers somewhat. Additionally, the Department of Public Welfare refused to refer its recipient cases to the office because it took the position that their law superseded the APA amendments and later because of the claim that there would be a loss of federal funds if someone else conducted these hearings. The department subsequently obtained a letter from the regional office of the U. S. Department of Health, Education and Welfare threatening the loss of federal funding unless an exemption was granted. The letter came to light very late in the 1976 Legislative Session and resulted in the passage of a bill exempting the federally funded assistance programs from the APA.[48] This resulted in the loss of approximately 500 contested case hearings annually.

A second loss of approximately 600 anticipated hearings was the result of the Department of Corrections seeking and obtaining an exemption for its hearings "involving the discipline or transfer of inmates or other hearings relating solely to inmate management".[49] This exemption, as well as the DPW exemption, remains in the law as of this date.

Two other agencies did not refer cases to the office as had been anticipated. The Department of Revenue simply put a number of its hearings "on hold" until it could seek legislative clarification. This clarification did not occur until the 1977 Legislative Session when it was determined that a few of its "contested cases", primarily in the area of iron ore and petroleum taxes, would be exempted but that the rest of its hearings were to be APA hearings.[50] The other agency not referring all of its cases to the office was, and remains, the Department of Public Safety. That agency has taken the position that because the commissioner has authority to summarily revoke or suspend a person's drivers license upon a finding that the driver is an unsafe driver, the right of the driver to a subsequent hearing is not a contested case under the APA.[51]

Another source of anticipated hearings which failed to materialize were those involving the implied consent law. As initially proposed by its author, Senator Alec Olson, the bill was to provide the right to an administrative hearing upon request. While the legislation was pending very late during the 1976 Legislative Session, Senator Olson had a meeting with the chief hearing examiner, a representative of the Department of Public Safety Drivers License Division, and the Special Assistant Attorney General assigned to that division. The purpose of the meeting was to discuss an appropriation for the hearings. The department, not very happy with the thought of another agency conducting its hearings, prepared a fiscal note wherein it projected an extremely high number of hearings and a cost for those hearings of two million dollars. As a result of those numbers, which later proved to be extremely inflated, Senator Olson amended his bill to require the implied consent hearings to be conducted by the municipal and county courts where they continue to be heard as of this date.[52]

Because the office was initially staffed in anticipation of a level of hearings which failed to materialize and an hourly charge established based upon a presumed number of billable hours, the office ran into a severe financial crisis within the first six months. Several steps had to be taken immediately. First, two hearing examiners were transferred to vacant attorney positions at the Department of Labor and Industry. A third examiner originally scheduled for the same transfer chose to return to the private practice of law. As we were preparing a similar reduction in support staff, two of the legal secretaries chose to transfer to other agencies. Second, a restructuring of the billing rate was implemented in order to bring solvency to the office's revolving account and to insure its stability at least through fiscal year 1977. These steps proved to be sufficient to resolve both the immediate and long-term problem.

As a result of the financial problems discussed above, the office began an in-depth look at all of its expenditures, hearing procedures and every other aspect of its operation. Two items of expense which were very large were court reporters and travel. The study of these two expense items resulted in cost saving proposals in both areas.

First, a time and cost study of the use of court reporters who were employees of the office versus the use of audio-magnetic recording devices and court reporters from the private sector was completed. It was found that the cost of the "in-house" court reporters' work product, one page of transcript, was in excess of $5.00 per page. Because of the lower costs charged by the private sector with whom we were in competition, we were unable to bill for 100% of our costs. Thus, the hourly billing rate for hearing examiner services was actually subsidizing the costs of maintaining an "in-house" court reporter system. We were only recouping $2.40 per page of typed transcript or a loss of in excess of $2.60 per page. To alleviate this problem, we initiated a written lay-off notice to all of our employee court reporters. All but two were able to secure other employment. Because these two had many years of governmental service and were experienced in utility rate hearings (where we came the closest to recouping our costs), we withdrew the lay-off notice to them. (These reporters remained on our staff until 1982 when they, along with reporters who had been transferred to the office in 1981 in the workers' compensation reform bill, were laid off due to abolishment of their positions as part of the budget reductions during the 1981 Third Special Session.)

The second action taken was a study of the nature and type of hearings we were conducting, especially those requiring any travel. We found several things which led to subsequent changes, some requiring legislative action and the other requiring better prehearing techniques by the examiners. The first thing we discovered is that we were traveling all over the state to conduct hearings where there were no adversarial parties. The second discovery was that a high number of cases were settled just prior to our starting the hearing.

In the first instance, our study showed that while we were supposedly conducting "contested" hearings, in many instances there was no opposing party and the hearing was nothing more than an oral repetition of information already contained in a written application required to be filed with an agency, which was then required to conduct an administrative hearing prior to acting on the application. We found these types of provisions in a number of agencies' statutes when the agency was requested to issue some type of license, permit or certificate of authority. After identifying the laws and the agencies involved, we met with the agencies to discuss a proposal to eliminate the need for these hearings except where necessary. After securing their agreement, an omnibus bill was drafted and passed by the 1977

Legislature which deleted the necessity for hearings in these cases except when there was opposition to the application or when the agency denied the application based on its written contents. The agencies were given discretion to initiate a contested case where deemed appropriate. This became known as the "uncontested-contested case" procedure.[33] This same procedure has been introduced into other statutes in subsequent legislative sessions.

In order to alleviate the problem of parties waiting until the hearing to discuss settlement of their differences, the office began to pursue various methods of getting the adversaries to discuss the case earlier. In many instances we had found that parties were unaware that an administrative hearing could be settled or that they could even talk to the agency representative prior to the hearing. There was also the fear that if one side initiated settlement discussions, it would be perceived as evidencing a weakness in their case. One successful method was to increase the use of prehearing conferences, both in person and by telephone, the latter when one party would have to travel more than 50 miles to attend the conference. Agencies were a little reluctant at first because they believed it would increase costs. After a short time, seeing the success of these conferences in saving both time and money, they actually began requesting us to hold a prehearing conference when they referred a case to us.

Another step taken to facilitate settlements has been the issuance of a prehearing order in certain cases which required the applicant for some type of permit to contact the opposing party to discuss settlement no later than ten days prior to the hearing. They then are required to report the results to the examiner. A failure to comply results in the case being continued. This procedure has resulted in an increase in early settlements in transportation cases of approximately 50%. The obvious result is a savings of both time and costs to all concerned.

As the first year drew to a close and the office prepared for the 1977 Legislative Session, which would be the first budgetary session for the office, a detailed report was prepared. The report analyzed not only budgetary information but also included statistical data on the number of cases received and the dispositions, as well as a breakdown of our billings, by agency. From the charts which follow, it can be seen how the workload of the office started out much lower than had been anticipated but slowly increased to the point where the office was operating at nearly full capacity by the end of the year.

CASES OPENED AND CLOSED
CALENDAR YEAR 1976

MONTH	OPENED	CLOSED	PENDING
January	159	14	145
February	57	32	170
March	50	51	169
April	65	47	187
May	67	37	217
June	85	69	233
July	66	61	238
August	85	55	268
September	86	79	275
October	74	43	306
November	60	94	272
December	47	72	247
Total	901	654	

SUMMARY OF BILLABLE HOURS AND TOTAL TRANSCRIPT SALES, BY MONTH

MONTH	BILLABLE HOURS	COURT REPORTER HOURS	TOTAL TRANSCRIPT SALES	TOTAL PAGES SOLD
January	718.1	310.5	$ 748.00	612
February	888.4	241.1	1,687.25	1017
March	1042.5	278.0	2,697.30	4074
April	1420.2	200.4	2,544.85	1273
May	1107.8	133.1	6,285.82	4447
June	1333.3	78.8	9,454.50	4426
July	1398.8	25.2	3,374.15	3020
August	1498.2	66.5	4,225.70	3561
September	1484.7	55.7	2,476.25	2075
October	1299.3	38.6	1,804.25	1541
November	1579.6	47.6	2,503.85	2152
December	1628.5	49.9	2,264.75	1835
Total	15,399.4	1525.4	40,066.67	30,033

AGENCY EXPENDITURES FOR HEARING EXAMINERS AND COURT REPORTER EXPENSES

AGENCY	FILES OPENED	FILES CLOSED	HE BILLED HOURS	HE TOTAL CHARGES	COURT REPORTER AND TRANSCRIPT CHARGES	TOTAL CHARGES
Attorney General	1	1	11.6	$ 464	0	$ 464
Agriculture	14	8	133.5	6,335	$ 168	6,503
Architects, Bd. of	3	3	47.6	1,846	27	2,116
Building Code	6	3	27.9	994	23	1,017
Board of Nursing	8	5	53.7	2,148	140	2,288
Board of Pharmacy	3	3	3.7	123	0	123
Board of Teaching	1	1	15.5	620	125	745
Veterinary Medicine	1	1	11.6	464	0	464
City of St. Paul	1	1	29.0	1,160	0	1,160
Cable Communications	2	2	119.7	3,287	0	3,287
Chiropractic Board	3	3	30.3	1,202	0	1,202
Commerce						
Commerce Commission	13	12	595.8	19,285	4,398	23,683
Banking	7	7	113.4	3,833	68	3,901
Insurance	17	6	262.4	8,890	2,869	11,759
Securities	43	29	316.3	10,606	1,291	11,897
Consumer Services	1	0	18.1	724	173	897
(Total Commerce)	(81)	(54)	(1306.0)	(43,338)	(8,799)	(52,137)
Corrections	1	0	6.1	244	0	244
Dentistry Board	4	4	35.3	1,412	0	1,412
Natural Resources	4	3	172.6	6,419	0	6,419
Public Safety	3	3	77.3	3,092	0	3,092
Transportation	1	0	3.8	152	0	152

Public Welfare	42	26	852.0	33,584	958	34,542
Revenue	9	7	170.1	6,804	212	7,016
Veterans Affairs	9	7	79.5	3,012	75	3,087
Energy Agency	8	2	485.6	19,556	2,099	21,655
Education	4	3	111.7	4,468	141	4,609
Ethical Practices	2	2	67.5	2,658	0	2,658
Environmental Quality	15	10	1034.5	39,099	2,078	41,177
Higher Education	2	2	144.1	5,285	0	5,285
Housing Finance	1	0	.3	12	0	12
Health Department	73	47	628.6	24,195	177	24,372
Human Rights	41	22	267.6	10,139	413	10,552
Highway Department	6	4	170.5	6,281	0	6,281
Labor & Industry	6	3	99.6	3,433	266	3,699
Livestock Sanitary Bd.	2	2	17.5	595	0	595
Metropolitan Council	1	1	122.9	4,916	0	4,916
Mpls. Public Schools	3	3	17.8	712	0	712
Nursing Home Admin.	3	1	30.2	793	0	793
Optometry Board	2	1	8.2	328	0	328
OSHA	134	97	1119.1	38,261	344	38,606
Personnel Board	6	4	80.5	2,902	0	2,902
Pollution Control	10	4	283.5	10,211	148	10,359
PERB	2	2	15.5	620	110	730
State Planning	3	3	132.5	5,394	60	5,454
Peace Officer Training	1	1	19.4	815	0	815
Public Service Comm.	357	290	6796.6	264,297	20,954	285,251
Psychology Board	1	1	5.9	236	15	251
State Register	1	1	79.9	1,838	0	1,838
State Arts Board	1	0	3.5	140	15	155
Cosmetology	9	5	52.5	1,986	150	2,136
Medical Examiners	7	6	289.6	11,086	864	11,950
Designer Selection	1	1	9.3	372	0	372
Secretary of State	1	1	70.9	2,655	0	2,655
State University Bd.	1	1	7.0	280	0	280
Total	901	654	15,359.1	$580,263	$38,604	$618,865

Chapter 6

1977 - 1981

The next five years of operation brought a stabilization to the operation of the office. The following table gives a picture of the office's operation during that time period. (For the purpose of this and subsequent tables, the information is provided on a fiscal year basis, the fiscal year running from July 1 to June 30. Thus, the following table includes date from July 1, 1976, through June 30, 1981.)

Fiscal Year	Billable Hours	Files Opened	Files Closed	Cases Pending	Reports Issued	Cases Settled	Percent Settled
1977	17,880.8	823	772	284	N/A*	N/A	N/A
1978	18,841.5	667	654	297	471	183	28%
1979	15,881.5	782	745	334	520	225	30.2%
1980	18,301.6	670	705	299	473	232	32.9%
1981	18,416.3	616	578	337	327	251	43.4%

*N/A = Not available

From the foregoing it can be seen that the previously discussed legislative changes and increased awareness of settlement procedures had a positive impact. The number of cases referred for hearing was reduced while both the number and percentage of cases settled increased.

From a purely fiscal point of view, the following table, which includes data from fiscal year 1976 (which was for only six months) shows the stabilization which occurred.

Fiscal Year	Authorized Complement	Positions Filled	Income	Expenses	Profit(Loss)	Carry Forward*
1976	35	25.5**	*276,781	341,623	($ 64,842)	$ 16,023
1977	35	21.5	840,067	650,936	189,131	205,154
1978	35	23.5	849,775	775,230	74,545	279,699
1979	35	23.5	844,910	818,411	26,499	306,198
1980	25	23.5	824,324	886,939	(62,615)	243,583
1981	25	24.5	781,206	938,085	(156,880)	86,703

*$80,865 was carried forward from the first half of FY 76.
**Represents positions filled at the close of the fiscal year.

Several things occurred during this five-year span of time. First, the Department of Finance had raised our January 1, 1976, hourly billing rate of $23.00 per hour to $40.00 per hour when the fiscal crisis hit in FY 76. At the same time, we were instructed to maintain that rate until our cash reserves exceeded three months of anticipated expenses. Once that point was reached, the rates were decreased on a temporary basis which was at the start of FY 80. We had also come to feel more comfortable with the caseload statistics and subsequently determined that the three months' cash reserve could be reduced to approximately two months. That reserve actually dropped lower than two months' anticipated expenses as costs increased a little faster than had been projected and we were unable to effectuate a rate increase until the start of FY 82.

Another significant occurrence during this time span was the beginning of a formal training program for our staff. As the law required that only hearing examiners "learned in the law" may conduct contested case hearings,[55] the hearing examiners must maintain licensure as an attorney which means that they must obtain at least 15 credits of continuing legal education each year. Because of the small size of the office and its limited resources, formal training programs within the office were found to be difficult, if not impossible to accomplish due to a lack of educational training expertise, time and cost. After reviewing many available alternatives from a substantive content and cost viewpoint, it was determined that other from outside of Minnesota state government could provide much higher quality training at a lower cost than if we were to try to implement a significant "in-house" program.

Seminars relating to the substantive areas of law directly related to the subject matter of OAH hearings are offered throughout the year by professional legal education associations including the University of Minnesota, William Mitchell College of Law, Hamline University Law School, the Minnesota Bar Association, the National Association of Regulatory Utilities Commissioners, and others. These associations have the ability to gather the leading experts in their respective fields and to provide one, two and three-day structured legal education programs at a nominal cost of approximately $85.00 per day. Given the previously discussed mandate that whenever possible hearing examiners are to be assigned to hearings with expertise in the subject matter of the hearing, these seminars have proven to be the most cost-effective method of both obtaining and maintaining expertise in the various fields of law.

In addition to providing training in specific areas of law, it was also found to be necessary to provide training in the procedural techniques of conducting hearings and writing decisions. By providing training of this type, it was through that we could bring more efficiencies to the administrative hearing process. To find this training, we consulted the Judicial Branch of the state to determine how it trained our state court judges. While our state judges have some minimal training programs within the state, we discovered that they had determined that the best and most cost-effective training programs for judges were conducted by the National Judicial College which has been training judges from all around the country and many foreign counties for more than 20 years. We discovered that the NJC also provides training for administrative hearing officials in a structured, classroom setting. Their courses include training for new judges in how to conduct fair and expeditious hearings, management of complex administrative hearings, decision making and decision writing, advanced evidence, reducing delays, handling of both medical and scientific evidence and only recently alternative methods of dispute resolution. An analysis of the costs of this training versus the benefits to be obtained led us to the utilization of this institution for our office.

The training program of the OAH evolved over the years of operation, the extent of training available each year being dependent on the availability of funds. At present, the training program requires all newly-hired judges to attend the two-week Fair Hearing training course at the NJC. Thereafter, provided that funds are available, all judges are allowed 56 hours of training time and $1,200 of training funds each biennium. Requests for attendance at any specific course is subject to supervisory approval. The benefits of this training program can be seen in the tables included within this report which related to the efficiencies brought to the administrative process in terms of reducing the time for issuing decisions and processing orders and the ability of the judges to handle more cases in less time.

Another program initiated within the OAH during this time span was the start of a working relationship with William Mitchell College of Law. The college wanted to start an administrative law clinical program for its students. The impetus for the clinic came from Professor Melvin B. Goldberg. The college admits up to 10 students per semester into the clinic, the students receiving two credits per semester for their work within the clinic. The students' names are referred to the OAH. They are assigned to at least two hearings per semester. They meet with the ALJ prior to the hearing, attend the hearing, do all necessary legal research, prepare a first draft of the decision, meet again with the ALJ and complete a final draft. The students meet in a classroom setting three times during the semester with Professor Goldberg and at least one representative of the OAH. Because most of these students have full-time jobs and attend classes at night, much of the time spent with the ALJ is before their normal starting time, during their lunch hours or after their normal work day.

The benefits to the students participating in this program are fairly obvious. What is not as obvious are the benefits to the State of Minnesota. The students perform the same function as a law clerk in conducting the legal research and the drafting of decisions. Their work product is usually at a very high level, thus allowing the ALJ to spend less time on a case than would otherwise be necessary. As the ALJ's time spent on a case is billed to the agency for which the hearing is being conducted, the agency benefits from a reduction in the cost of the hearing process. The OAH benefits by the ALJ's being able to handle more cases thus allowing the office to maintain a smaller full-time staff than would otherwise be necessary. As an example of the time saved for the state, during the fall semester of 1985, the students spent a total of 536.4 hours of legal research and decision writing. Assuming that it would take the students twice as long as an experienced ALJ, the total hours saved for the state agencies would be 268.2. At a current billing rate of $68.00 per hour, this amounts to a cost savings to the state agencies of $18,237.60.

During this same time period, a number of bills were passed by the legislature which had varying impacts on the operation of the office. This legislation also impacted on all other agencies where the amendments were made to the APA. These bills and the impacts are discussed below, by year of passage.

1977

1977 Minn. Laws, Ch. 162. This bill amended Minn. Stat. Ch. 105 to make it clear that hearings conducted for the Department of Natural Resources were contested cases under the APA. The department had taken the position that because their statute contained specific hearing procedures, they were somehow exempt from the APA. This bill brought hearings to the OAH which had been anticipated in the 1975 planning but which had never been referred. The bill was the result of a constituent complaint made to Representative Gene Wenstrum following a Ch. 105 water permit hearing which had been conducted by the same person from DNR who had originally denied the permit application.

Minn. Laws 1977, Ch. 323, Secs. 1 and 2. These sections amended the APA to require the Department of Administration to provide one free copy of the State Register to each county library or the library designated by the county board and one copy of the manual of state agency rules to be provided in the same manner. These amendments, which did not contain an appropriation, resulted in an increased cost of publication of both the State Register and the manual of rules. These increased costs were passed along to all state agencies by increasing the charges for publishing rules in both publications. Thus, the bill served to increase costs of rulemaking.

1977 Minn. Laws, Ch. 430, Sec. 7. This bill amended the APA by removing the total exemption from the APA for the Department of Economic Security but maintained its exemption for the unemployment insurance program. The department was thus forced to comply with the APA rulemaking requirements and to refer its non-unemployment contested cases to the OAH. This increased costs for the department in rulemaking but the impact on the OAH was minimal as the number of cases referred to the OAH was quite small and the hearings were all generally very short.

1977 Minn. Laws, Ch. 443. This was the 1977 APA bill. It clarified many sections of the APA which had been adopted in 1975. Section 1 added the Capitol Area Architectural and Planning Board to the definition of "agency" thus bringing them within the APA requirements. Other sections amended the rulemaking sections by clarifying that the APA itself did not grant substantive rulemaking authority to agencies. It also specifically allowed agencies, with the approval of the chief hearing examiner, to incorporate certain materials into their rules by reference rather than repeating the materials in the rules, which was costly. The time for keeping the rulemaking record open for submission of comments following a hearing was increased from five to twenty days. The OAH internal policy of requiring all hearing examiner reports to be issued within 30 days of the close of the record was made mandatory by statute with the proviso that the chief hearing examiner can extend the time for good cause. To further shorten the process, the time for rules becoming effective was shortened from twenty to five days following publication in the State Register. To save costs, agencies were allowed to publish only those parts of the adopted rules which were modified after the first publication. The concept of "emergency" rules was changed to "temporary" rules (a change which subsequently led to problems and the eventual change back to "emergency" rules). Agencies which had adopted or would be adopting rules exempt from the APA were provided a procedure for filing with the Secretary of State. Agencies were given authority to appeal adverse decisions from the district courts to the Minnesota Supreme Court. The chief hearing examiner was given subpoena power which was necessary where hearings were conducted for agencies which did not have subpoena power and to allow the private sector to obtain subpoenas. The emphasis for keeping the record at hearings was changed from court reporters to audio magnetic recording devices. Finally, standing committees of the legislature were directed to study the feasibility or necessity of making the APA applicable to the metropolitan agencies and "encouraged" those agencies to voluntarily contract with the OAH for services. (Only the Metropolitan Waste Control Commission has ever contracted with the OAH.)

1978

There was no significant legislation passed impacting the APA or the OAH, either directly or indirectly.

1979

1979 Minn. Laws, Ch. 332, Art. I., Sec. 8. This amendment to Minn. Stat. § 15.0411, subd. 2, exempted the Public Employment Relations Board (PERB) from the contested case provisions of the APA. PERB serves as an appellate body from decisions of the director of the Bureau of Mediation Services who is also exempt. The purpose of utilizing the OAH for hearings envisions adversarial hearings where evidence is presented. PERB does not conduct evidentiary hearings. The OAH and PERB jointly proposed and supported this amendment.

1979 Minn. Laws, Ch. 336, Sec. 15. This newly added provision of the APA (Minn. Stat. § 15.065) prohibited the departments of Health, Human Services, Economic Security, Corrections and the health related boards from adopting any rule having an annual fiscal impact in excess of $100,000 without first providing the House Appropriations and Senate Finance Committees with a fiscal note. The effect of this amendment, while providing information to the legislature and thus an opportunity for legislative input, has been to increase the cost of adopting certain rules and to increase the time for adoption.

1980

1980 Minn. Laws, Ch. 614, Sec. 70. The Minnesota Personnel Board was abolished. This board determined appeals of state employee disciplinary action when the employees did not use the grievance procedure in the various bargaining agreements. The OAH, which had been conducting the hearings and making recommendations to the board, was given authority for these determinations. As initially adopted, the decisions of the hearing examiners were only recommendations to the agency which had initiated the disciplinary action. Final decisionmaking authority was subsequently given to the OAH (see Minn. Laws 1982, Ch. 560, Secs. 32 and 33).

1980 Minn. Laws, Ch. 615. This was the 1980 revision to the APA. The bill was the result of a task force first formed in 1978 to study the APA. The task force was comprised of a representative from the Office of Senate Counsel, the Office of House Research, the Office of Administrative Hearings, the Office of the Attorney General, and several representatives of state agencies along with an equal number of representatives from the private sector. This task force was initiated by the Senate and House Governmental Operations Committees to review the APA changes since 1975 and to come up with proposed changes. A bill was proposed by the task force in 1979 and passed the House of Representatives in that year. It was held over in the Senate so that additional hearings could be conducted during the summer of 1979 and into the 1980 regular session. The bill finally passed the 1980 Legislature as the second-to-last bill passed for that year. (The only bill passed later than the APA bill was a bill proposing a constitutional amendment to allow initiative and referendum.) The reason that the bill was late in passing had nothing to do with the APA itself but, rather, the bill became a vehicle for other legislation, part of it aimed at deregulation of cable communications and the other at the Metropolitan Council agencies. These latter items were subsequently stripped from the bill in conference committee and the APA bill was passed.

Much of this bill involved clarification of ambiguous language. As an example, there was a question on the extent of the jurisdiction of the LCRAR. This bill clarified that the LCRAR jurisdiction included all rules, not just those adopted pursuant to the APA. The bill further clarified the language relating to the LCRAR suspension of rules. Section 3 of the bill was the result of a survey completed by the LCRAR relating to variances of rules by the agencies. Many agencies felt that they could not grant variances from rules. This amendment specifically allows agencies to grant variances from their rules provided that they first adopt a rule which establishes procedures for persons to apply to the agency for the variance, and adopt standards and criteria by which the variance will be granted.

A significant change in the APA was the introduction, for the first time, of a notice and comment rulemaking procedure for rules which would be noncontroversial in nature. Prior to this bill, every agency adopting rules was required to conduct a public hearing which was then conducted by the OAH. This amendment allowed agencies to proceed to adoption of rules without a hearing with the provision that if seven or more people objected, the agency was required to go to a public hearing. The OAH would not be involved in the rulemaking proceedings unless the hearing was required. The Attorney General's office continued its role in reviewing these rules. The legislation actually used the term "noncontroversial rules". (This phrase was changed in 1984 legislation to be discussed later.)

Another significant change was the introduction of the revisor of statutes into the rulemaking process. Many agencies had complained that they were unable to get assistance in the drafting of rules from the attorney general's office for one reason or another. After determining that there could be conflicts of interest in having assistance given by the attorney general or the OAH, the Senate decided that the revisor of statutes should be allowed to provide the ruledrafting assistance and, in fact, would then be the office which had final authority over the form of the rules. This change was aimed at providing rules with more clarity and uniformity in form and, where agencies actually had no one on staff to draft rules, to assist them in the drafting and thus speed up the process.

Deadlines were imposed on agencies for the adoption of rules following a hearing. Several instances had been brought to the legislature's attention where agencies had proposed rules but had failed to adopt them following receipt of the hearing examiner's report. This legislation required agencies to do two things within certain deadlines. First of all, when agencies were told to adopt rules, they were to initiate the rulemaking process by publishing proposed rules within six months of the effective date of the legislation or to report to the legislature why they had failed to do so. The second deadline was that agencies were required to either adopt rules within six months of the hearing examiner's report or the rules could not be adopted without starting the process over again. Also, they are required to report to the legislature on this failure to adopt rules.

Other miscellaneous changes included the change of the name of the Office of Hearing Examiners to the Office of Administrative Hearings. The bill also clarified the rulemaking authority of the director of the Bureau of Mediation Services to insure that that agency was subject to the APA. In the past, BMS was exempt because their rules had to be approved by the Public Employees Relations Board. The legislature removed the authority of PERB to approve these rules. Another miscellaneous change was to remove the rulemaking exemption for the Department of Economic Security. Finally, the Revisor of Statutes was given authority and responsibility for the publication of Minnesota Rules which was previously with the Department of Administration, State Register.

1981 (Regular Session)

1981 Minn. Laws, Chapter 109. This bill amended Minn. Stat. § 15.0413 to clarify that every rule, including interpretive rules, is required to go through the Administrative Procedure Act. This amendment was in response to a Supreme Court decision[34] which left in doubt the requirements that interpretive rules were required to go through the APA. In order to further clarify the legislative intent, the amendments gave full force and effect of law to all rules, retroactive to their effective date, provided that those rules were adopted under the APA which was in effect at the time of the adoption, that the rules were approved by Attorney General at the time of adoption, and that the agency had statutory authority to adopt the rules. This amendment answered a lot of questions for agencies which had been a direct result of the Supreme Court decision.

1981 Minn. Laws, Chapter 112. This legislation amended Minn. Stat. § 3.965, subds. 3 and 5, relating to the LCRAR. Under prior law, if the LCRAR required an agency to hold a hearing on a rule, the hearing had to be completed within 60 days. This amendment gave the LCRAR discretion to allow the agencies more than 60 days to conduct the requested hearings. This was necessary because, in many instances, it was impossible for the agencies to draft the rules and give proper notice of the hearing within 60 days.

This amendment also clarified the procedures to be followed when a rule is suspended by the LCRAR. The amendments clarify that the suspension was not to take effect until notice of the suspension had been published in the State Register. It also provided that the LCRAR was responsible, as opposed to the agency, for sending the suspension notice to the State Register for publication.

1981 Minn. Laws, Chapter 131. This bill amended various sections of Minnesota statutes. It requires State agencies to provide interpreters for persons with communication handicaps in many instances, including administrative hearings. The bill also detailed specific prohibitions relating to interpreters divulging confidential information. While there is no question that the provision of interpreters is necessary, the providing of interpreters at administrative hearings is an additional cost to State agencies (however, the increase in cost has been minimal).

1981 Minn. Laws, Chapter 253. This legislation was sponsored by the revisor of statutes. It was a result of the revisor, who first became involved in the rulemaking process in 1980, having an opportunity to review the APA and proposing clarification changes. While the bill as originally proposed was solely for clarification purposes, as finally passed there were some substantive changes, as will be discussed below.

Section 1 of the legislation amended Minn. Stat. § 3.965, subd. 2, in an attempt to clarify the jurisdiction of the LCRAR. In fact, the legislation extended the jurisdiction of the LCRAR to all rules, whether they were exempt from the APA or not, as long as they were rules which were filed with the Secretary of State. Under prior law, it was thought that exempt rules were also exempt from the jurisdiction of the LCRAR. The amendment also clarified the procedures to be followed once the LCRAR had suspended a rule.

One important part of this legislation was the result of the revisor of statutes having searched all of the statutes to find specific exemptions from the APA which were "hidden" in various statutes. This bill brought those exemptions within the APA sections and then amended the substantive laws to pull the exemptive language out. In this way, an attempt was made to bring uniformity to exemptions from the APA by ensuring that they were found within the APA. This was an excellent amendment in that persons only have to look to the APA to find out which agencies are exempt from which sections of the APA. Another benefit of the revisor's review was the identification, for the first time, of numerous exemptions to the APA as a whole, or to specific exemptions. With respect to specific program exemptions, in the succeeding publication of Minnesota Statutes, the revisor listed all of these program exemptions in a footnote to the particular sections of the APA. This was the first attempt to identify, for the legislature and the public, the various APA exemptions.

Section 5 of the legislation clarified a problem which had existed. Many agencies believed that they were required to go through the APA requirements to repeal rules even though the underlying statute had been repealed. The agencies were probably correct, given the strict interpretation of the APA. In practice, the agencies simply ignored the rules and did not apply them. However, until they were repealed, they were continuously published in all rule publications. Agencies did not want to go through the time and expense of repealing rules. This amendment took care of that problem by providing that the rules adopted under a statute which is subsequently repealed are also repealed, thus relieving the agencies from the requirement of going through the APA.

Other clarifying language was made in the rule adoption sections including the removal of the word "promulgate" and insertion of the word "adopt". The revisor has attempted to utilize the uniform word "adopt" in subsequent sessions and to remove, wherever possible, the archaic word "promulgate" which is a word that left people wondering whether it meant "propose" or whether it related to the final adoption of a rule.

Section 7 of the bill has proven to be an important section in terms of speeding up the rulemaking process and making it easier for the agencies. This section established a statutory list of material or text which may automatically be incorporated into rules by reference. It also changed the authority for approval of incorporations by reference from the chief hearing examiner to the revisor of statutes but provided that the revisor of statutes could only approve incorporations by reference after consultation with the chief hearing examiner. This allowed agencies to speed up the rulemaking process. When taking rules to the Revisor under the prior language, if the revisor spotted an incorporation by reference, the rules had to be referred to the chief hearing examiner for approval. By having the approval accomplished at the same time and and place as rule drafting, considerable time, and thus expense, has been saved.

Section 15 was the result of problems which had arisen under the temporary rulemaking provisions. Agencies previously were allowed to adopt temporary rules which would be in effect for 90 days and could have them effective for an additional 90 days if they published notice. Agencies were routinely extending the time of the effectiveness at a cost of publication in the State Register and cost of mailing. In fact, it was extremely difficult for agencies to propose temporary rules as well as permanent rules at the same time, complete a rulemaking hearing, and have permanent rules in effect within 180 days. Thus, the statute was changed to allow temporary rules to be in effect for 180 days without having to extend the time. Further, it prohibited an extension without specific statutory authority.

Section 20 was adopted as a response to agencies who were concerned about how they could have their rules published even though their rules were exempt from the APA. This section clarified how these exempt agencies, or agencies whose rules were exempt, are to file rules, which included previously unfiled rules. A deadline was established by which the previously unfiled rules had to be filed in order to have the force and effect of law. This was an aid to the revisor who had been given the authority for compilation of the rules. The revisor had found numerous rules which had been adopted but not filed. This section provided the impetus for getting all adopted rules filed and thus eligible for compilation. Those agencies which failed to file their rules within the deadline would face the problem of their rules being automatically repealed by operation of statute.

A very short section of the bill, and a seemingly innocuous section, specifically applied Minn. Stat. Chapter 645, the Cannons of Statutory Construction, to all rules. Prior to this amendment, while the hearing examiners, most agencies, and most courts looked to Chapter 645 for guidance, there was no specific provision allowing its application when problems in construction of the language of rules arose. This amendment clarified the application of Chapter 645 and the result has been entirely favorable.

1981 Minn. Laws, Chapter 357. Sections 25 and 26 of this bill exempted certain rules from the rulemaking provisions of the APA. The rules exempted were those which set fees. These amendments allowed fee setting by rule but prohibited the public hearing provisions of the APA so long as the total fees to be collected were not to exceed 110% of the sum of all appropriations to the particular agency for the program for which the fees were being collected. It required the commissioner of finance to approve all fees prior to the agency proposing the fees. (These amendments proved to be controversial in subsequent sessions as the initial language was ambiguous. In subsequent sessions, the language was clarified but the basic thrust of these amendments has been maintained.) These amendments resulted in a time saving as well as a savings of expense to those agencies which are required to collect fees but only after establishing the fees by rule.

1981 Minn. Laws, Chapter 346. This was the 1981 workers' compensation legislation. The legislation made a number of significant changes to the Workers' Compensation Law (Minn. Stat. Ch. 176). Of significance to the operation of the OAH was the transfer of the workers' compensation judges from the Department of Labor and Industry (DOLI) to the OAH. This bill had a significant impact on the OAH which will be discussed in the succeeding chapter.

Chapter 7

1981 Workers' Compensation Law Changes, Implementation and Recommendations for the Future

As briefly mentioned in the preceding chapter, Minn. Laws 1981, Chapter 346, amended Minn. Stat. Chapter 176 in many significant ways. Of significance to the OAH was the language transferring the workers' compensation judges (WCJ), all court reporters assigned to the judges, and their support staff from DOLI to the OAH. The bill also provided that the transfer, which was effective July 1, 1981, was to include the removal of the WCJs from the same building that housed DOLI by no later than January 1, 1982. In other words, the OAH was prohibited from having any of the WCJs having an office in the same building as DOLI.[56]

While one of the stated reasons for transferring the WCJs was to move them to an independent agency and thus free them from any actual or even the appearance of any lack of independence in decision making, some within the legislature were fearful that the independence and decision making would somehow be impaired by the transfer to the OAH. Thus, another amendment which was placed in the law was to remove any salary setting authority for the WCJs from the appointing authority, the chief hearing examiner, and to set the salaries of the WCJs at 75% of the district court judges.[57] Additionally, because of a fear that somehow the OAH might assign hearing examiners to workers' compensation cases, the legislation specifically provided that only workers' compensation judges were to hear cases arising under Chapter 176, the Workers' Compensation Law.[58]

In the language transferring the WCJs, discretion was impliedly given to the commissioner of finance to transfer the appropriate funding and necessary support staff. While the language of the legislation was specific as it related to the WCJs and court reporters, no specific numbers of support staff to be transferred, nor positions, were included nor was there any specific amount of funding to be transferred delineated.[59] This proved to be troublesome, as could be expected, when the legislature removes part of a program, including personnel, from one agency and transfers it to another. The administration of DOLI viewed the transfer as a "hostile takeover", having opposed the transfer language quite vigorously during the legislative session. This was a natural reaction which is bound to occur any time the legislature reorganizes government, especially when it involves the transfer of personnel where the transferor agency is opposed.

The problems created by the lack of specificity in the bill were subsequently exacerbated when state revenues began to fall short of projections and several special legislative sessions were called to reduce budgets. Because the funding for workers' compensation was from the general fund, the OAH was subsequently asked to reduce costs, as will be discussed in the next chapter. The reason this created additional problems was because the funding transferred to the OAH, at least according to the documentation put together at the time, was insufficient to cover the cost of operation for the first fiscal year. Secondly, it was the opinion of the OAH at the time of the transfer that insufficient support staff positions were being transferred in order to accomplish the reorganization. At first, DOLI transferred one legal secretary and two vacant positions. After the OAH appealed to the commissioners of finance and administration, three additional positions were to be transferred. However, the OAH requested that three persons be transferred who had expertise in the operation of the workers' compensation section instead of three vacant positions. To do otherwise would have created even more chaos than was created by the transfer itself. Without the transferred expertise, including knowledge of the docketing and filing system within the Workers' Compensation Division at DOLI tremendous delays in the reorganization would have occurred.

Because the legislature required the removal of the WCJs from the same building that housed DOLI, the OAH was required to immediately search for new facilities. DOLI had offices for the WCJs at the Space Center Building in St. Paul. However, it also had a "branch" office in the Summit Bank Building in Minneapolis where it had two attorneys and a hearing reporter serving as a secretary, as well as seven hearing rooms. None of the WCJs were actually officed at the Minneapolis facility. The first thing that had to be accomplished was to determine where the majority of hearings were required to be conducted. A study found that 93% of the workers' compensation hearings requested to be set for hearing within the seven county metropolitan area, were requested to be set within the city of Minneapolis. It was determined that this was a result of several factors. First of all, the vast majority of the injuries were occurring in Hennepin County. Secondly, a much higher number of lawyers practicing in the field of workers' compensation are located in Hennepin County. Finally, the majority of the medical experts used in workers' compensation cases were found within Hennepin County. Based on this study, it was determined that the proper place to move the offices of the WCJs would be to Minneapolis.

Part of the decision to locate the office in Minneapolis was a study of the costs incurred in travel and parking as well as the costs of "down time" of the WCJs. The OAH initially was proposing to have its offices in the midway district of St. Paul, equal distance from the Space Center in St. Paul where two hearing rooms were to be kept, and the Summit Bank Building in Minneapolis. However, once the time and expense study was completed, it was found that by having the judges officing at a facility other than where the hearings were conducted would result in a loss to the State of Minnesota of approximately $167,000 per year. While looking at these cost figures, the OAH also had to look at the costs which might be increased for the conduct of hearings by the APA section and a decision made relative to that section. It was found that 98% of the APA hearings were conducted at a location other than the OAH and thus the specific location of the OAH made no significant difference. Therefore, a decision was made to move the office to the city of Minneapolis, within Hennepin County.

As with the initial organization of the office in 1975, the Real Estate Management Division of the Department of Administration proved to be an invaluable aid in our finding suitable facilities for our offices and hearing rooms. Their expertise in locating available facilities, negotiating with the building owners and real estate agents, and in facilities' design made our task of finding new facilities much easier. In particular, Beverly Kroiss of that agency, who was assigned to work with us, spent many hours assisting in the project. Her personal experience and professionalism were invaluable to the office. She arranged for a review of facilities on a very tight schedule to maximize the use of our time. Just as we were about to make a commitment to locate the offices in a specific facility in downtown Minneapolis, the owners of the Summit Bank Building where DOLI had previously rented a small amount of space, informed Ms. Kroiss that they had additional space available and would like to have us look at their facilities. We immediately reviewed their submission and subsequently viewed the property. Given the location of the facility (one-and-one-half blocks from the Hennepin County Government Center), its accessibility to the skyway system, its convenience in terms of mass transit, immediately adjacent parking facilities, and the proposed square-footage rate, a decision was made to locate our offices and 13 hearing rooms on two floors of that facility. At the same time, a decision was made to maintain an office in the city of Duluth with one WCJ and one support staff person and at the same time to have two hearing rooms located in the Space Center in St. Paul where the Department of Labor and Industry is located. The Minneapolis facilities were designed with the help of Ms. Kroiss and architects from the Summit Bank, the offices were constructed and the move was completed during the month of December 1981.

At the same time that we were attempting to find adequate facilities for the office, we began a study of the system for adjudication of contested workers' compensation cases. During the course of the 1981 Legislative Session, we had been present during the discussions by the legislative committees and had some idea of the problems which they sought to solve by transferring the WCJs to the OAH. One of the most often-heard complaints, following second only after high insurance premiums and the number of cases resulting in litigation, was the length of time it took to process a case once the litigation had begun. The "benchmark" which everyone looked to when discussing delay was the length of time between the date of the filing of a claim petition to the date of the hearing. The date of filing was considered to be the date on which the claim petition was accepted for filing by DOLI and the date on which the petition was then served on the employer and insurer by DOLI, which was a requirement of the statute at that time. We found that no one was using the date on which a judge's final order was issued as the date on which the case was concluded. Another problem cited by many was the delay in the processing of appeals to the Workers' Compensation Court of Appeals (WCCA). (It should be noted that the delay discussed in regard to the WCCA was not in the processing of the case once at the WCCA but in getting the case to the WCCA.) Another complaint often heard was the delay caused by the loss or "misplacement" of correspondence sent to judges. Finally, it was stated that their was no incentive for parties to resolve their differences by settlement of the issues because of substantial delays in the approval of the settlement and the issuance of an award by a compensation judge. These problems, actions taken to resolve them, and the results are discussed below.

A. Filing and Service of Claim Petitions. While the 1981 legislation was still pending, the then-deputy commissioner of DOLI, R. B. Swanson, and the chief hearing examiner began a study of the existing system whereby claim petitions were served by the department. It was estimated that it required a minimum of one person to process these petitions, at a total estimated cost, including postage, of $35,000 annually. Additionally, parties had complained that substantial delays were occurring by the failure to promptly process the petitions or by rejection of the petitions for various real or perceived defects. As a result of the study, amendments were proposed while the 1981 legislation was still pending, which amendments were included in the legislation. These amendments require petitioners to serve the claims themselves prior to filing with DOLI rather than having DOLI file the petitions.[60] While it is obvious that this amendment corrected a problem, the extent to which it has actually reduced delay cannot be ascertained because no records had been maintained prior to the passage of the 1981 legislation.

B. Conclusions of the Hearing Process. In response to previous complaints that it had been taking too long for a case to be heard once filed, the then-commissioner of DOLI, Harry Peterson, had initiated two new procedures at DOLI. First, he established one of the compensation judges as a settlement judge. Second, he increased the number of cases set for hearing each day. While these steps did result in a reduction in the length of time between the filing of the petition and the initial date scheduled for hearing, in fact, the process was further delayed for many cases. In order to see how this occurred, one must first have an understanding of the prior system.

Prior to the Peterson-initiated changes, a calendar judge conducted scheduling conferences, either in person or by telephone. A hearing date was established at this conference based on the time available for the parties and the length of time the parties indicated they would require to complete the presentation of their evidence. If the case subsequently settled, the compensation judge would have that date available for decision writing. The judge would also be required to review the settlement when the stipulation was received, and issue an award if the judge found the settlement to be reasonable, fair and in accordance with the Workers' Compensation Law. There were no support staff positions assigned to assist the judges in the preparation of their decisions. None of the judges had dictation equipment assigned to them. Only three telephones were available for the 16 trial judges. Therefore, on Mondays when no hearings were scheduled, the judges would have a court reporter assigned to them for the purpose of dictating orders and awards. The reporters would then prepare the orders or awards when they were not in hearings. Orders were sometimes delayed in typing for three to four or more weeks.

Commissioner Peterson determined that parties would be more apt to settle a case sooner if forced to get together before an impartial person solely for the purpose of discussing settlement. He was correct in his thinking as the statistics provided from DOLI have shown. However, for every case settled in this manner, it meant that there would be one less case settled after being set for hearing, which left one less day available for a judge to work on preparing decisions. This resulted in delays in the preparation and issuance of the orders and awards.

Another change initiated by Commissioner Peterson was to increase the number of cases set for hearing each day. Cases not initially assigned to judges when set for hearing are referred to a "back-up" cases. Thus, when a case which had been assigned to a judge was settled, the judge would then be assigned to hear one of the back-up cases. Obviously, this further reduced the time a judge had available to prepare and issue decisions. Finally, in the same category, cases wherein the parties indicated that they would need more than one day of hearing were set for one day only. This allowed more cases to be initially set for hearing in a shorter time but required the parties to either obtain an additional later date to complete the case or to incur the cost of taking depositions of those persons who did not present their testimony at the hearing. In the latter instance, the judge would lose the benefit of personally seeing the witnesses, which is sometimes necessary when judging the credibility of these witnesses. Further, the judge would have to read the testimony when the depositions were received at a later date, plus review all other testimony once again because it would be "stale" by the time the judge had sufficient time to begin work on the decision. The delays caused are obvious.

When the 1981 transfer became effective, the transferred judges were asked to prepare a list of all cases which they had heard but which were still waiting for a decision. It was found that on the average there were 15 cases pending per judge. Some had been pending for nearly 24 months, many for more than one year. All of the judges were concerned about this backlog, which they indicated was a direct result of the settlement judge process, the increased number of back-up cases being set, and the "calendar crunching" or setting of cases for hearing for less time that really was necessary to conclude the testimony.

Immediate steps taken to relieve the back-up situation were the reduction of the number of back-up cases set for hearing and removing one or two judges at a time from the responsibility of hearing cases so that they could concentrate on issuing their backlog of decisions. By the end of March 1982, all but two of the transferred judges were virtually current in the issuance of decisions. One of those two judges retired, leaving his cases for other judges to decide, and the other judge was current by the end of June of 1982.

As a part of the reorganization, further steps were taken once the move of the judges was accomplished. Dictation equipment was purchased for all judges. Secretarial support staff utilizing word processing equipment were hired to fill the transferred vacant positions. The secretarial support staff were assigned to specific judges. Court reporters were no longer assigned to the preparation of judges' orders except in emergency situations. As DOLI had received authority in 1981 to increase its settlement judges to three, it was assumed that they would settle nearly three times as many cases as before. (Eventually, DOLI increased the number of settlement judges to five.) The assumptions that more cases would be settled before they were transferred to the OAH has proven to be correct although the settlements did not triple. As a result of this assumption, we reduced the number of back-up cases so that at the present time we set only one back-up case each day for every two-and-one-half judges available for hearing (not on leave or assigned to road trips). Cases were also set for sufficient time to complete all testimony at the hearing. A rule was adopted requiring that in the case of any witness who did not intend to appear at the hearing, their deposition was to be taken prior to the hearing so that the case could be totally submitted to the judge at the time set for hearing. A performance standard was established for the judges which requires all decisions to be issued within 60 days after a case was fully submitted for decision. This performance standard was subsequently adopted into law with the further requirement that in the event a judge failed to issue a decision within 60 days, they would lose their pay while any cases were waiting to be issued within the time period.[61] Judges were also required to submit a "Case Record Report" at the end of each month wherein the status of all cases pending before the judge is detailed. Finally, statistics on each judge and on the office as a whole are maintained and published within the office each month.

In addition to the adoption of procedural rules for the conduct of hearings and internal policies and procedures which accompanied the reorganization, the OAH sought a number of legislative changes to the Workers' Compensation Law during the 1981 Special Legislative Sessions, the 1982 regular session, and the 1983 regular session. The specifics of these legislative changes will be discussed in a later chapter. The changes requested by the OAH were aimed at reducing delays in the system. However, while the OAH was seeking procedural changes to the law, the legislature continued to make substantive changes in the Workers' Compensation Law, not the least of which have been major amendments to the law during the 1983 Legislative Session.[62] The substantive changes in the law had an immediate positive impact by the reduction of cases certified to the OAH for hearing. However, for a variety of reasons, not the least of which is uncertainty over the interpretation of many sections of the new law, there has now been an increase in the number of claim petitions filed. Because the hearings include many new and complex issues, more expert testimony is required which has the result of requiring more hearing time. Thus, while the OAH had been continuing to work toward reductions in delay, within the past 12 months the trend is slowly reversing as the number of cases filed and the length of the hearings conducted increase.

As a result of the changes discussed above, the following have occurred:

1. Length of Hearings. In April of 1980, 84% of the cases were scheduled for one day or less. This compares to November of 1985 where only 51.7% of the cases are set for one day or less. The following chart on case settings gives a more graphic picture of the change in the length of hearings.

Case Settings

	April 1980	March 1983	Nov. 1984	March 1985	Sept. 1985	Oct. 1985	Nov. 1985
1 Day or Less	84%	68.2%	67.5%	69.6%	63.0%	59.5%	51.7%
1-1/2 Days	9%	14.6%	16.8%	21.8%	23.5%	25.7%	35.5%
2 Days or More	7%	17.2%	8.2%	8.6%	13.5%	14.8%	12.8%

2. Time to Issue Decisions. In December of 1981, the average length of time for decisions to be issued was 101 days following the close of the hearing record. By July of 1982, this had been reduced to an average of 45.6 days. By June 30, 1985, at the conclusions of FY 85, the average time to issue final decisions during FY 85 was 31 days, 52% of the decisions being issued in 30 days of less. For the first six months of FY 86, the time has been further reduced to an average of 27 days.

3. Conclusion of the Hearing Process. Apparently prior to 1981, no records other than the time from the acceptance of a petition for filing to the initial date of hearing were maintained. DOLI had been reducing the length of time from the filing of a petition to hearing prior to the transfer. However, they were not maintaining records on the length of time for the issuance of decisions which, as can be seen from above, was an average of 101 days. Using data from claim petitions filed in December of 1982, it took 13 months to get a hearing date and an additional 66 days for a decision to be rendered. At the present time, after having previously reduced the time between the filing of a claim petition and the first hearing date to ten months, it now takes eleven months to the first available hearing date but the time for issuance of decisions is 27 days. Thus, the total time for disposition of a case is approximately 12-and-one-half months. This is down from 15-1/2 months during the FY 83 time period.

4. Backlog of Pending Decisions. As stated previously, the backlog of pending decisions (cases wherein the hearing had been conducted but no decision having been issued) was an average of 15 cases per judge on July 1, 1981. As of December 31, 1985, the average backlog was 7.2 cases per judge. Of the 136 cases pending as of December 31, 1985, 74 were cases which had been

heard but wherein the record was still open awaiting additional evidence. This represents 54.4% of the pending cases.

C. Processing of Appeals. Prior to July 1, 1981, court reporters employed or under contract to DOLI were present at all hearings to keep a record of the proceedings. The employee court reporters were also responsible for typing judges' orders. The employee court reporters had been allowed to keep all income derived from the sale of transcripts of hearings with which they had been involved. While they were told that the transcripts were to be prepared on their own time since they received the proceeds, many of the transcripts were prepared during normal working hours. Because of their additional duties, delivery of transcripts took considerable time, in some instances more than one year to complete. Appeals from compensation judge decisions are not sent to the WCCA until the transcripts are completed.

Effective July 1, 1981, a 21-day deadline for the delivery of transcripts was imposed. Additionally, all proceeds from the sale of transcripts were required to be paid to the office revolving fund. The court reporters initiated a lawsuit over the imposition of the foregoing which resulted in a delay in implementation of the new procedures until the lawsuit was resolved by settlement in September of 1981. In addition to the new procedures, the office began tape recording many workers' compensation cases, thus allowing court reporters more time to prepare transcripts. At the same time, more contracts were entered into with court reporters from the private sector so that when the employee court reporters were required to prepare a transcript of a hearing, they could spend all of their time preparing the transcript in order to meet the 21-day deadline.

During the 1981 Third Special Session, one of the the "budget cutting" sessions, the legislature required that the OAH discontinue the use of court reporters who were state employees as soon as existing labor agreements permitted.[63] Because of the settlement of the 1981 lawsuit, this could not occur until September 30 of 1982. In the same session, the legislature mandated the use of audio magnetic recording devices to keep the record in all two-party cases but did allow parties to bring in their own court reporters at their own expense so long as the reporters were from a list approved by the chief hearing examiner. It also, by implication, mandated that the OAH utilize court reporters for multi-party cases.[64] Prior to September 30, 1982, the office began preparation for the layoff and expanded the contracts with the private sector for both court reporting services and for the transcription of the tapes of those hearings wherein an audio magnetic recording device had been utilized. Once the layoff had occurred and all severance and unemployment compensation payments had been made, the office was able to calculate the total savings to the state as a result of the layoff. When taking into consideration the salaries of the court reporters at the time of the layoff, inflated for normal cost of living increases which have occurred for all state employees since that time, and deducting the present costs of maintaining the record at the hearings, it is estimated that this provision has resulted in a cost savings of approximately $450,000 during fiscal year 1985.

At the present time, the office has contracts with court reporters in the private sector to provide both the court reporting and transcription services. These contracts require that transcripts be furnished within 21 days. In fact, several of the transcription services are now providing the transcripts in less than seven days. Thus, the delay in the processing of appeals has been greatly reduced. No comment can be made in this report on the time of completing an appeal once it is sent to the WCCA as the OAH keeps no records on that issue. However, it must be assumed that a large part of the reason for previously heard complaints arose from the delay in getting the cases to the WCCA.

D. Delivery of Correspondence. For whatever reason, mail sent to compensation judges was not reaching the judges. When mail was received at DOLI, if the file could not be found, the mail was placed in a box for later review. At times, this mail never reached the files or the judges. As a result, it had become common practice for lawyers to send mail to the judges marked "personal and confidential" or to actually send the mail to the judges' homes. The defects in such a system are obvious. Additionally, it was discovered that lawyers routinely copied the judges on all correspondence between themselves and the insurance companies and routinely filed everything with the judges, even though there was no law nor rule requiring such filing.

Changes were made effective January 1, 1982, when the move into separate offices was concluded, including notification to all attorneys that mail was no longer to be sent "personal and confidential" and that no mail was to be sent to judges at their homes. Additionally, in order to reduce the volume of mail and thus reduce the size of the file requirements, all attorneys were notified that their "junk" mail was not to be sent to the judges and that only those matters required to be filed by law, rule or order of the judge were to be filed.

These changes have dramatically reduced the volume of mail and thus has assisted in speeding up the delivery of the mail to the judges. Further, the office established a priority system whereby most mail is delivered to the judge by staff, allowing the judge the opportunity to determine whether the correspondence is necessary for filing, should be discarded, or that the file is needed. Mail is delivered to the judges in this fashion within 24 hours of its receipt, most on the day that it is received. Priorities by subject matter have also been established for all items received in order that the mail will be handled as expeditiously as possible. One very important aspect of the mail handling procedures involves Stipulations for Settlement, which will be discussed below.

E. Settlements. The Workers' Compensation Law has long recognized that cases do not always require a full hearing and that parties may desire to resolve their differences through a settlement process. Minn. Stat. § 176.521 has provided the statutory framework for such settlements since 1953. However, due to a variety of reasons, not the least of which has been the Worker' Compensation Law as a whole and the procedures required to be followed in settlements, the percentage of contested matters settled in workers' compensation has been, and continues to be, considerably less than found in civil cases in the district courts. In the court system, 95% to 98% of all cases are settled without a hearing. It was found that in FY 81, only 63.1% of the total contested workers' compensation matters were resolved through settlement.

One of the reasons most commonly expressed for the low percentage of settlements had been the delay in obtaining the approval of a compensation judge and the uncertainty of the settlement being approved. Prior to February of 1982, if a settlement was agreed upon by all parties, a Stipulation for Settlement was prepared, signed by all parties, and submitted to the commissioner or a compensation judge for approval. The standard for approval was that the terms of the settlement must be "reasonable, fair and in conformity with" Chapter 176. No rules have ever been adopted to define what is reasonable or fair, thus leaving discretion in the compensation judges. In fact, what was reasonable and fair to the parties and some judges would not be considered reasonable and fair by other judges. Some judges had applied standards which they termed "unwritten rules" or "long-standing policies" when reviewing cases submitted for settlement approval. One judge expressed an opinion of the role of a compensation judge in this regard as being "responsible for protecting injured employees from their own folly". This issue was addressed in the 1981 Third Extra Session of the legislature. Prior to that time, Minn. Stat. § 176.521 provided that if all parties were represented by attorneys, the submitted settlement was "presumed" to be reasonable, fair and in accordance with the Workers' Compensation Law. That section was amended to provide that where all parties to a case are represented by attorneys, the settlement is conclusively presumed to be reasonable, fair and in conformity with the Workers' Compensation Law.[65] This provision was limited in 1983 by providing that the "conclusive presumption" only applied where the settlement did not purport to be a full, final and complete settlement of an employee's right to medical compensation or rehabilitation under Chapter 176.[66] At the same time as these amendments were being made, top priority was being given to settlements received in the office, both in mail distribution and in the establishment of a performance standard for the judges. The performance standard is that all awards are to be issued within ten calendar days of receipt of the Stipulation in the office. The results of these changes are as follows:

1. Length of Time to Issue Awards. Immediately following the transfer in 1981, it was determined that the average length of time to issue an Award on Stipulation was 51 days. By January of 1982, Awards on Stipulation were issued in an average of 43.47 days. By December of 1982, following the effectiveness of the "conclusive presumption", the average time had been reduced to six days. By March of 1983, the average time to issue Awards on Stipulations had been reduced to four calendar days. Since that time, even following the limitations imposed during the 1983 Session, the average time to issue these awards has consistently remained four calendar days for FY 84, FY 85 and for the first six months of FY 86. During December of 1982, 86% of the Awards on Stipulation were issued in less than ten days. By July of 1982, 57.6% of the awards were being issued in ten days or less. This number was then increased to 84% for the entire 1983 fiscal year, 93% for FY 84 and 96% for FY 85.

2. Number of Settlements. The increases in the number of cases settled can be seen in the chart below. In reviewing the chart, it should be remembered that the amendment to the law was effective starting in February of FY 82.

Awards on Stipulation

	FY 81	FY 82	FY 83	FY 84	FY 85	FY 86
July	215	171	358	361	450	418
August	188	290	393	459	417	451
September	163	288	341	406	324	367
October	174	325	371	363	429	528
November	179	198	372	295	375	377
December	291	308	412	400	390	387
January	232	249	407	432	429	
February	298	388	427	364	442	
March	273	450	510	374	313	
April	230	386	367	340	452	
May	308	400	426	468	492	
June	287	396	459	487	336	
Total	2838	3849	4843	4749	4849	

3. Percentage of Settlements. As previously stated, during FY 81, 63.1% of the total dispositions were by settlement. For FY 85, 78.9% of the total dispositions were the result of settlements. This figure is still well below those of the district courts in civil cases.

F. Other Matters. The OAH discovered many other areas of the Workers' Compensation Law wherein ambiguities in the law were resulting in litigation. It worked with DOLI in finding these ambiguities and coming up with language to amend the statutes to remove the ambiguities. Additionally, many other areas of the Workers' Compensation Law were reviewed by OAH and DOLI resulting in various amendments to the Workers' Compensation Law. While DOLI has been more concerned over the substantive provisions of the law, the OAH has attempted to keep its review to the procedural aspects of the law. At the present time, there is continued concern over delays in the workers' compensation system. As stated above, while the delays were being reduced, albeit slowly, changes made by the legislature in 1983 have resulted in an increase in the number of claim petitions being filed, and an increase in the length of time to hear cases. While the 1983 changes were an attempt to reduce "litigation", until such time as the WCCA and the Minnesota Supreme Court have had an opportunity to interpret the 1983 law changes, it is anticipated that there will continue to be an increased number of claim petitions filed. Additionally, further changes were made to Chapter 176 in both 1984 and 1985. It is anticipated that additional changes to the Workers' Compensation Law will be made by the 1986 Legislature. Each time the legislature makes changes in the law, it will result in uncertainty in the interpretation of the laws which leads to an increase in litigation. Litigation, for the purpose of this report, is defined as any administrative proceeding wherein the legal rights, duties or privileges of specific parties are required by law or constitutional right to be determined. Thus, when one includes the administrative conferences conducted at DOLI with the increase in the number of claim petitions filed and the slowly increasing number of objections to discontinuances or petitions for discontinuance filed, litigation has increased dramatically. The following charts show, by fiscal year, the number of claim petitions filed each month during the fiscal year, the number of petitions for or objections to discontinuances filed (which are referred to the OAH) and the number of notice of intention to discontinue ((NOID) received at DOLI and the number of discontinuance conferences held at DOLI since the implementation of the 1983 changes.

Claim Petitions

	FY 81	FY 82	FY 83	FY 84	FY 85	FY 86
July	384	266	393	379	406	451
August	358	412	419	404	405	420
September	372	400	387	392	309	398
October	378	392	400	412	409	459
November	377	345	398	371	378	404
December	419	405	408	401	351	427
January	383	343	438	382	379	
February	386	325	414	395	402	
March	403	409	462	456	389	
April	397	400	402	408	433	
May	369	346	360	407	441	
June	401	385	377	401	378	
Total	4627	4428	4858	4808	4680	

Discontinuances

	FY 81	FY 82	FY 83	FY 84	FY 85	FY 86
July	101	106	78	73	27	60
August	78	104	74	61	43	57
September	64	80	109	46	20	56
October	78	65	102	37	58	55
November	59	55	86	49	39	38
December	83	73	87	38	54	43
January	95	85	90	50	48	
February	90	95	77	52	41	
March	82	87	101	33	48	
April	75	83	72	33	43	
May	71	80	86	49	49	
June	115	74	67	46	49	
Total	991	987	1029	566	519	

		NOIDs Received	Discontinuance Conferences Held
December	1983	214	96
January	1984	186	100
February	1984	247	107
March	1984	240	131
April	1984	251	109
May	1984	218	99
June	1984	305	97
July	1984	337	115
August	1984	331	117
September	1984	339	100
October	1984	371	148
November	1984	375	141
December	1984	347	87
January	1985	363	120
February	1985	415	107
March	1985	493	124
April	1985	425	124
May	1985	464	161
June	1985	399	146
Total		6320	2229

Another fact we must review in determining the overall disposition level of workers' compensation cases is the number of decisions issued by the compensation judges. If there is, as stated previously, an increase in the length of time to hear a case, fewer cases can be heard each month. The following chart can be used to verify that previous assumption.

Workers' Compensation Judge Decisions

	FY 81	FY 82	FY 83	FY 84	FY 85	FY 86
July	97	50	62	89	59	65
August	86	80	74	92	78	74
September	70	89	59	77	67	60
October	94	99	59	72	76	60
November	80	65	78	73	75	62
December	93	69	78	78	70	71
January	80	77	93	68	86	
February	90	67	70	64	68	
March	99	115	94	65	68	
April	86	72	74	69	79	
May	95	58	92	81	73	
June	98	88	91	63	72	
Total	1068	929	924	891	871	

Even though there appears to have been a recent trend of an increase in filings, it is too early to determine FY 86 statistics. The following chart shows a five-year statistical comparison to show the number of contested matters filed for hearing which are referred to the OAH versus the number of dispositions. When looking at dispositions, it should be remembered that dismissals and awards on stipulation include those issued by DOLI. In short, this is a "system-wide" chart. It shows that in FY 81 there were 1,448 more cases filed than were disposed of versus FY 85 where there were 807 more cases disposed of than had been filed. Given the first half of FY 86 statistics, we are anticipating that even though there will be an increased number of cases filed for hearing, there will still be more cases disposed of than are filed.

Minnesota Workers' Compensation
Five-Year Statistical Comparison

	FY 81	FY 82	FY 83	FY 84	FY 85
Claim Petitions	4627	4428	4858	4808	4680
Objections to Discontinuance	942	959	1020	463	425
Petition for Reimbursement	56	117	144	111	137
Retraining/Rehabilitation	225	137	105	160	N/A
Change of M.D.	38	54	64	15	N/A
Petitions to Discontinue	49	28	9	103	94
TOTAL	5937	5723	6200	5660	5336
Dismissals	456	488	527	523	423
Findings	1068	929	924	912	871
Awards on Stipulation	2838	3849	4843	4749	4849
Others	127	148	35	0	0
TOTAL	4498	5414	6329	6184	6143
Difference	(-1448)	(-309)	+129	+524	+807

In order to more efficiently process the caseload, the OAH has set goals and established programs to increase both efficiency and productivity. Use of a computer to keep track of cases, issue pretrial orders and hearing notices and to actually assign and set cases for hearing allows our support staff to handle more work with fewer mistakes or oversights. It also will allow us to schedule our judges more fully and, additionally, will give us the availability of at least half the time of our calendar judge to hear cases.

The OAH has now implemented monthly staff meetings for all WCJs to discuss case law developments and any problems or issues which may be common to all of them. This allows the OAH to have some degree of uniformity in its approach to common problems or issues. It is believed that these monthly meetings have achieved greater communication among the judges and greater productivity. Additionally, the training program discussed in a previous chapter has proven to be most effective as we discovered that prior to the transfer to the OAH, none of the WCJs had ever been allowed time off to attend training programs nor given any specific training in the conduct of hearings or the writing of decisions. We have seen a noticeable difference and improvement in the quality of both the conduct of hearings and the issuance of written decisions since implementing the training program.

G. A look to the future. At the time of the preparation of this report, the 1986 Legislative Session had not yet commenced. However, from conversations with the commissioner of DOLI, several Senators and Representatives, and others actively involved in the field of workers' compensation, it is anticipated that the legislature will make additional changes to the law. However, it is questionable whether the legislature can make any changes to the substantive structure of the benefits portions of the law because apparently no accurate data exists to determine whether the changes made in 1983 will have any impact on the reduction of workers' compensation insurance rates to Minnesota employers. Testimony at legislative hearings held during 1985 and January of 1986 have indicated that over the past year or so, Minnesota employers have received an average of 35% to 45% increase in workers' compensation insurance premiums and in some instances increases of more than 100%.

Thus, it has become apparent that changes are necessary. Where those changes will occur remains to be seen. However, one area which continues to be a problem is the delay in the disposition of contested workers' compensation claims. Several proposals have been put forth. It is believed that the OAH has done everything it can do by rule or internal policy to reduce delay and thus any further reductions in delay must be the result of legislative changes. Absent such changes, the only way to have an immediate impact on the delay in the system is to hire more compensation judges. While this will resolve the problems on a short-term basis, additional changes in the law must be made if the delays are to be prevented, on a long-term basis. Proposals for amendments to existing law which would assist in delay reduction could include the following;

1. The notice required by Minn. Stat. § 176.271 be amended to mandate that the notice must include all medical reports not previously submitted to the employer and that the notice and the reports be sufficient to establish the claim.

2. Amend Minn. Stat. § 176.305 by removing the settlement judge provisions, requiring the claim petitions to be referred to the OAH within ten days following their filing, allowing DOLI to reject any claim petitions which are incomplete or which fail to include all necessary documentation.

3. Amend Minn. Stat. § 176.306 to require all hearings to be held within six months of the filing of a claim petition, continuances to be granted only upon a showing of good cause and to be granted only by the chief ALJ or designee. The same section might include a requirement that not only attorneys but their clients must sign all requests for a continuance.

4. Minn. Stat. § 176.312 be amended to differentiate between a petition for removal or automatic reassignment of a judge and an affidavit of prejudice for cause.

5. Any case referred to the OAH wherein an answer has not been filed nor an extension (of not more than 30 days) granted by the commissioner or agreed upon, in writing, by the petitioner, shall be set for hearing at the first available date on the OAH calendar.

6. Amend Minn. Stat. § 176.341 to require all cases to be heard within six months of the filing of the claim petition, including the provision that no continuance may be granted which would not allow the case to be heard within the six months, giving discretion to the chief ALJ to schedule settlement or prehearing conferences as may be appropriate.

7. Add a provision mandating that all evidence must be presented at the hearing and that only in cases of surprise or other exceptional cause will any evidence not submitted at the hearing be considered. This should include all evidence relating to taxable costs and attorney fees.

8. Amend Minn. Stat. § 176.411 to require that all depositions and other discovery must be completed within 90 days of the filing of a claim petition.

9. Require all adverse medical examinations to be completed within 45 days of the filing of the claim petition and the report of the exam to be served and filed 15 days thereafter.

10. Amend Minn. Stat. § 176.155, subd. 5, to allow full testimony of a health care provider only with the approval of the chief ALJ or designee. Delete the provisions allowing full testimony after the hearing except in cases of surprise or other statutorily-stated good cause.

Chapter 8

1982-1985

As can be seen from the preceding chapter discussing the changes involving workers' compensation, legislation passed by the 1981 regular session of the Minnesota Legislature brought major changes to the OAH. While in the process of the reorganization, the state of Minnesota, as was the case with the rest of the states in the nation, faced an economic recession. This resulted in numerous special legislative sessions wherein many changes were made in an effort to reduce the overall costs of the operation of state government.

At the start of FY 82 on July 1, 1981, the office had reorganized itself as is shown on the organizational structure at the end of this chapter.

As can be seen from that structure, upon transfer of the workers' compensation cases to the OAH, the chief hearing examiner personally supervised all of the WCJs. The responsibility for supervision of the court reporters in the workers' compensation section was the responsibility of the docket administrator for workers' compensation, while the supervision of the court reporters for the APA section of the office remained the responsibility of the administrative assistant. When the legislature met to consider reductions in the cost of operation of government, as discussed in the preceding chapter, the office was faced with the problem of reducing expenditures in workers' compensation where the funding for the office came from the state general fund. As a result, several vacant support staff positions remained unfilled and all court reporters were laid off. While it was initially thought that the APA section would be effectively immune from any budget reductions, we saw an impact due to reductions in the budgets of other agencies. As the budgets of the other state agencies were reduced, these agencies began to find other ways of resolving disputes which otherwise would have led to administrative hearings. This resulted in a reduction in the requests for services of the OAH.

At the same time as the results of the budget reductions were being felt, the office was also seeing the results of the 1980 amendments to the APA which allowed agencies to adopt rules without the necessity of a public hearing unless seven or more people objected to the rules and requested a hearing. While rulemaking had never comprised more than 20% of the total number of hearings conducted by the office, because of their complexity the billable hours produced by those hearings were higher, on the average, than contested cases. The following chart, beginning with FY 78, shows the impact of the implementation of the "noncontroversial rulemaking" provisions.

Rulemaking Hearings as a Percentage of Total Reports Issued

Fiscal Year	Total Reports Issued	Rulemaking Reports Issued	Percentage of Reports Which Involved Rulemaking
78	471	92	19.53%
79	520	71	13.65%
80	473	69	14.59%
81	327	32	9.79%
82	345	24	6.96%
83	391	18	4.6%
84	352	13	3.7%
85	331	21	6.3%

While the requests for OAH services for rulemaking hearings was diminishing, agencies also began their own cost-saving techniques which resulted in a decrease in requests for services following the 1982 legislative sessions. At the same time, as discussed in prior chapters, the office was implementing new settlement techniques, increasing the training and thus efficiency of its staff, and utilizing law students from the William Mitchell College of Law. The following table, which is a continuation of the table produced at the beginning of Chapter 6, gives a picture of the office's operation from July 1, 1981, through June 30, 1985.

Fiscal Year	Billable Hours	Files Opened	Files Closed	Cases Pending	Reports Issued	Cases Settled	Percent Settled
1982	20,210.0	542	557	322	345	212	38.1%
1983	15,637.2	625	633	314	403	230	36.3%
1984	13,462.5	557	604	267	353	251	41.6%
1985	12,090.2	651	620	298	331	289	46.6%

As can be seen from the foregoing table, while the number of files opened remained fairly constant, the number of billable hours was reduced dramatically. This is a direct result of our efforts at settling cases which continued to increase to 46.6%, efficiencies within the office, increased utilization of law students from William Mitchell College of Law, and several other new types of cases referred to the office which required considerably less time to complete. With respect to the latter comment, the Department of Revenue began submitting cases under the state's Revenue Recapture Act passed in 1980 and discussed in Chapter 6. Additionally, the office began to receive more cases from political subdivisions of the state, especially from Special School District No. 1 (the City of Minneapolis school district), the City of Minneapolis Civil Service Commission, and the Hennepin County Personnel Board. Many of these cases involved very little time yet accounted for a large number of the files opened and closed each year.

From a purely fiscal point of view, the following table, similar to that in Chapter 6, shows the financial status of the office for fiscal years 1982 through 1985.

Fiscal Year	Authorized Complement	Positions Filled	Income	Expenses	Profit (Loss)	Carry Forward
1982	25.5	21.25	1,253,410	1,163,077	90,333	177,036
1983	25.5	20.5	939,357	1,013,037	(73,680)	103,356
1984	20.5	15.5	824,105	864,916	(40,811)	62,545
1985	20.5	15.5	855,167	832,492	22,675	85,220

In reviewing the two tables above, it must be remembered that at the beginning of FY 82 workers' compensation was transferred to the office. As part of the reorganization, several of the positions from the APA section were split between the workers' compensation section and the APA section. As an example, one-half of the position and thus one-half of the costs of the chief hearing examiner and the administrative assistant are split between the two funds. This helps in accounting for the reduction in the total number of positions filled and thus the reduction in expenditures. Besides the splitting of several positions between the two funds, the APA section further reduced its staff of hearing examiners during this period by three, bringing the total number of hearing examiners at the end of FY 85 to nine. Thus, over the ten years of operation, the OAH reduced its staff of hearing examiners by five-and-one-half positions (37.9%) while the total number of cases received from FY 77 to FY 85 was reduced from 823 to 651, a reduction of 172 cases or 20.1%. From FY 79 where a high of 520 hearing examiner reports were issued there has been a reduction in the number of reports issued of 189 or 36.3%.

As indicated in a prior chapter, at the inception of the office an internal policy was established whereby all reports were to be issued within 30 days of the close of the hearing record unless an extension of time was granted for good cause. Statistics on this issue were first kept beginning with FY 78. During that fiscal year, 85.1% of the reports were issued within 30 days of the close of the record. For FY 85, 93.7% of the 310 reports issued were issued within 30 days of the close of the hearing record. Office-wide, the average length of time for the issuance of a report from the close of the hearing record was 14.5 days. (FY 85 was the first year wherein office-wide statistics on the length of time to issue decisions was kept.)

During this last four years, legislation directly impacting the OAH was passed. Other legislation having indirect impact on the OAH was also passed by the legislature, not the least of which were the budget-cutting provisions of the special and regular sessions of 1982. At the same time, the legislature continued to amend the APA as well as continued to grant further exemptions from the APA requirements. The following is a review of the legislation passed during this four-year period.

1982

1982 Minn. Laws, Chapter 424, § 130. This section of the law gave specific authority for the revisor of statutes to recompile (recodify) the APA if the revisor deemed it appropriate. Following this authority, the revisor recodified the APA from Chapter 15 to Chapter 14 of the Minnesota Statutes.

1982 Minn. Laws, Chapter 512, §§ 4 and 6. Section 4 of this bill amended Minn. Stat. § 17.83 (1981) to provide that when an agency was adopting rules which may have a direct and substantial impact on agricultural lands, it must include that fact in the notice of hearing and must further inform the commissioner of agriculture of that fact, in writing. Additionally, the statement of need and reasonableness must describe the possible adverse effect on the agricultural lands and discuss the alternatives considered. Section 6 of the law amended the APA to cite to the amendments to Minn. Stat. § 17.83. Obviously, this amendment created an additional burden on state agencies in rule adoption. Whether the legislature considered the additional delay or costs to the agencies in the rulemaking process versus the benefits to the agricultural land at the time of the amendment is not known to this writer as very few state agencies were aware of the amendments and thus did not testify at any committee hearings on the legislation.

1982 Minn. Laws, Chapter 560, §§ 10, 32 and 33. This bill recodified the laws relating to the Commissioner of the Department of Employee Relations. The law allows the commissioner to develop "administrative procedures" which are exempt from the provisions of the APA. The administrative procedures are to be procedures relating solely to internal management of the state and are not to have any direct or indirect impact on the rights of citizens in dealing with state government. Sections 32 and 33 amended the personnel law to clarify the provisions relating to appeals by employees from disciplinary action when the employee does not have a collective bargaining agreement which contains specific grievance procedures. The amendments allow that employee the right to appeal a discharge, demotion, or suspension directly to the chief hearing examiner who is to assign the case to a hearing examiner. A hearing is conducted at the expense of the disciplining agency and the decision of the hearing examiner is a final decision appealable by the employee or the agency to the courts.

1982 Minn. Laws, Chapter 562. This bill directly amended the APA. The bill responded to a problem discovered in temporary rulemaking. It was proposed jointly by the Department of Human Services and the OAH. Previously, temporary rules were allowed to be effective for 90 days plus an additional 90 days if a notice was published. That section was amended to provide for 180 days without any extension. This amendment allowed an additional 180 days following a notice. Testimony supporting this provision came from several agencies which had found it difficult to be able to publish temporary rules and permanent rules at the same time and complete the entire hearing process within 180 days. This testimony included direct testimony from the OAH which had found it nearly impossible to complete the process of adopting permanent rules for workers' compensation within 180 days. The second section of this bill amended Minn. Stat. § 256B.02, subd. 8, relating to the Department of Public Welfare's drug formulary which had previously been allowed to be adopted without complying with the APA. This had been changed to allow temporary rulemaking and this amendment specifically allowed a change in the fixed dispensing fee to be accomplished under temporary rulemaking but limited any change to 180 days.

1983 (The APA is now recodified as Chapter 14.)

1983 Minn. Laws, Chapter 138. This bill amended Minn. Stat. § 14.38, subd. 6, to exempt rules of the Game and Fish Division of the Department of Natural Resources from approval of their form by the revisor of statutes. This bill was proposed by DNR and was found to be necessary to clarify that the game and fish rules were totally exempt from all APA provisions which had been the initial intent. A question had been raised over the revisor's authority.

1983 Minn. Laws, Chapter 188. This was an entirely new provision which became codified as Minn. Stat. § 14.115. It amended the APA to require agencies to give consideration to small businesses in rulemaking. The provisions require agencies to take additional steps in giving notice and considering alternatives when new or amended rules will affect small businesses. If the agency fails to give the notice and consider alternatives, the rules are prohibited from being adopted if the hearing examiner or the attorney general find noncompliance. It further requires each agency to review its rules every five years and to consider, during this review, reducing the impact of the rules on small business. Certain temporary rules and fees under Minn. Stat. § 16.085 were exempted. The LCRAR was required to monitor the implementation of this law.

1983 Minn. Laws, Chapter 210. This was the APA bill for the 1983 session. It accomplished a number of things:

1. It clarifies the authority of the revisor of statutes that all rules, unless exempt, must have approval of the revisor; clarified incorporation by reference as approved by the revisor; clarified procedural steps for filing with the revisor at all stages of the rule promulgation.

2. It changes the statutory language of six months to a computation of 180 days within which agencies must propose rules after a law is passed granting rulemaking authority and requires agencies to give notice to the LCRAR if they do not propose the rules within the deadline.

3. Clarifications were made to what must be included in a mailed notice of rulemaking.

4. The time for keeping the hearing record open following a hearing was expanded by three days to allow agencies an opportunity to respond to proposed amendments and comments filed by members of the public.

5. This clarified the deadline for the adoption of rules by changing the term "six months" to "180 days" after receipt of the report of the hearing examiner but excludes the time for the chief hearing examiner's review, the attorney general's review or any review by the LCRAR.

6. Clarifications were added to the notice requirements for notice and comment rulemaking and added the requirement, under notice and comment rulemaking, that rules are to be submitted to the attorney general within 180 days at the end of the comment period or the rules are prohibited from going forward.

7. The OAH authority relating to court reporters was changed to specifically allow parties to hire their own court reporters when the OAH determined to keep the record by an audio magnetic recording device. (This is identical to the change which was made for workers' compensation during the 1981 Third Special Session.)

1983 Minn. Laws 1983, Chapter 247. This bill created the Minnesota Court of Appeals. Previous to the implementation of this law, appeals from administrative agencies went directly to the district courts in the state, either Ramsey County which is the seat of state government, or the district wherein the action arose. This bill changed the jurisdiction for appellate review of administrative agency decisions to the newly-created Court of Appeals. This included review of contested case decisions and review of adopted rules.

1983 Minn. Laws 1983, Chapter 290. This was the 1983 workers' compensation reform bill which was discussed in a previous chapter. The bill did increase the complement of the OAH by two positions to allow for the hiring of a workers' compensation specialist to assist the judges in computation of benefits and for the hiring of an assistant chief hearing examiner. Procedurally, the bill removed jurisdiction for medical disputes from the compensation judges and gave such jurisdiction to the commissioner of DOLI. A requirement that medical evidence be submitted by report only unless the compensation judge determined that full medical testimony was crucial to the determination of the employee's entitlement to benefits was added. A provision was added to allow DOLI, the WCCA and the OAH to adopt joint procedural rules. The approval of attorney fees was changed from the requirement that all fees be approved to an automatic award of up to $6500. It removed the jurisdiction for determining excess fees from the WCCA to the WCJs. The bill established administrative conferences for all notices of intention to discontinue, following which the aggrieved party can file an objection to discontinuance or a petition for discontinuance depending on the determination of the commissioner. It also specifically allows for the filing of affidavits of prejudice similar to that in district court in workers' compensation cases. Clarifications were made to the notice of hearing provisions to assist the OAH in its work. An amendment was added to allow non-attorneys to file petitions for intervention from the Departments of Human Services and Economic Security. (This amendment was necessary because the WCCA had ruled that only attorneys could make filings on behalf of those two agencies.) Clarifications were added to the provisions requiring decisions by compensation judges in order to clarify the content, format and timing of the decisions which also included the requirement of decisions being issued within 60 days or the judges were to suffer a loss of pay. Clarifications were added to the provisions for transcripts in order to delineate who is responsible for the preparation of the transcript in case of appeals. The jurisdiction of the WCCA was limited to only those issues specifically listed in the notice of appeal by the parties, thus prohibiting the WCCA from taking up issues it determined to decide on its own motion. The standard of proof for hearings was set at a preponderance of the evidence while removing all language relating to "remedial legislation". The "conclusive presumption" for settlements was limited so that it does not apply to full, final and complete settlements of rehabilitation or medical issues.

1983 Minn. Laws 1983, Chapter 299. This was the bill which established salary ranges for department heads. As passed by the House of Representatives, the chief hearing examiner's salary was established at the same salary as the district judges for the state courts. This was an effort to keep the chief hearing examiner's salary ahead of the WCJ's whose salaries had previously been established as a percentage of the district court judges as had the WCCA judges. As finally passed, the chief hearing examiner's salary was established in a range of $50,000 to $60,000 to be determined by the Governor. (In 1984, the Governor determined that the chief administrative law judge's salary should be the same as the district court judges but given the law could not set the salary at the same level because the top of the range would have had to have been exceeded.

1983 Minn. Laws 1983, Chapter 301. This was the 1983 State Departments Appropriations Bill. Section 15 of this bill was a rider to the appropriation to the OAH which established the study of alternative dispute resolution to be headed by the LCRAR. The LCRAR was to include the OAH, the State Planning Agency, and the Bureau of Mediation Services in the study. Section 64 of the bill contained language which was intended to clarify the fee setting provisions of the APA which allowed agencies to set fees without going through a rulemaking hearing. (As will be seen later, these amendments added further confusion and required changes during subsequent legislative sessions.) Section 148 through 152 of the bill amended the workers' compensation law by limiting the authority of the WCCA, on their review of a WCJ's decision, to the substantial evidence test and further prohibited the WCCA from disregarding findings of fact of the workers' compensation judge. The purpose of this amendment was to give more weight to the compensation judge's findings with the hope that this would reduce the number of appeals filed in workers' compensation matters. (The percentage of appeals of compensation judges' decisions had risen to 47.6% during FY 83. This percentage dropped to 43.1% for FY 84, 42.2% at the end of FY 85, and was 45% at the end of the first six months of FY 86. However, the amendments have had the effect of reducing the percentage of cases reversed by the Court of Appeals. Prior to the amendments, the Court of Appeals had been reversing at the rate of approximately 22%. For the second quarter of FY 86, the percentage of reversals had been reduced to 16%.)

1984

1984 Minn. Laws 1984, Chapter 567. This bill amended the Minnesota Human Rights Act by authorizing the OAH to adopt "policies" to provide sanctions for intentional and frivolous delays while discrimination cases were being investigated or prosecuted. It also provided that parties could file their cases directly with the OAH if the Department of Human Rights had failed to find either probable cause or no probably cause within a specified time period. Finally, a clarification on the amount of damages to be awarded was made to allow the imposition of treble damages in certain situations.

1984 Minn. Laws 1984, Chapter 640. This was the 1984 APA bill which was the result of more than six months of meetings conducted by the Administrative Law Section of the Minnesota Bar Association and a committee appointed by the chairman of that section. The committee contained representatives of state agencies, the attorney general's staff, public interest groups, and private sector lawyers and businesses. While a great number of changes to the APA were considered by this committee, because the committee could not reach a consensus on major changes, the bill eventually proposed and passed did not contain as many significant changes as had originally been assumed were going to be made. However, several significant amendments were made as follows:

1. During the pendency of this legislation, the Department of Economic Security had received word from the federal government relating to social security disability determinations. The federal government was attempting to remove some cases from the federal administrative law judges and had requested the 50 states to establish a disability determination unit within their states. The establishment of such a unit would clearly have come within the definition of a contested case. The department proposed an exemption to the APA with the support of the United States Department of Health and Human Services. The legislature granted an exemption from the APA for this unit so that it would remain within the Department of Economic Security. (Subsequent investigation of other states has determined that the disability determination programs in other states are conducted by independent hearing units within those states.)

2. "Temporary" rules were changed back to "emergency". Following the 1980 changes and the use of the word "temporary", the legislature had passed numerous bills containing temporary rulemaking authority. It was thought that the use of the word "temporary" had been the reason for the increased use of this rulemaking provision. The intent was that rules be adopted solely under emergency situations and thus the term "emergency" was replaced in the statute.

3. Rules which incorporate by reference other materials, are required to specifically state that they are incorporating other material by reference and what those materials are.

4. The procedures for filing rules with the revisor of statutes were clarified.

5. In order to allow parties an opportunity to review what an agency proposes to utilize in support of its rules before the notice of hearing is issued, a provision requiring the preparation of a statement of need and reasonableness before an agency orders the publication of a hearing notice was added. (It should be noted that through an oversight this provision does not apply to notice and comment rulemaking.)

6. Several amendments were added to clarify the provisions of the APA without changing their meaning. One was to restructure the language in the APA to give emphasis to notice and comment rulemaking rather than giving emphasis to rules being adopted following a hearing.

7. The number of persons required to force an agency to go to hearing on rules was raised from seven to twenty-five. The number 25 was picked from the 1981 Model State Administrative Procedure Act and was a compromise between competing interests.

8. Certain of the procedures relating to the public hearings were clarified including requirements on the agency, questioning of persons who testify, and clarifying the authority of the hearing examiner to limit repetitive or immaterial oral statements and questioning. The three extra days which had been added to the law in 1983 for the agency to respond was extended by allowing all parties an opportunity to respond during the three days. Another clarification amendment related to procedures for review of rules by the hearing examiner and the chief hearing examiner.

9. One of the most significant amendments to the APA in 1984 related to the problem of emergency rulemaking. The APA was amended to limit the authority of an agency to adopt emergency rules to 180 days after the effective date of a law giving the emergency authority, with certain exceptions for agencies issuing bonds. This limitation was necessary, in the eyes of some, because several agencies had obtained temporary rulemaking authority in 1982 and had not, as of the 1984 session, adopted any rules. Thus, this "use it or lose it" provision was added to the bill. (Of interest to some will be the fact that several laws passed during the same legislative session specifically exempted temporary rules in those laws from this provision.)

10. The APA listed, for the first time, the specific materials which were to be included in the rulemaking record.

11. Of significance to the staff of the OAH was the change in title from hearing examiner to administrative law judge. This change in title brings Minnesota into conformity with the federal government and the majority of states in titles for their administrative hearing officials.

12. A clarification was made specifically authorizing unclassified positions within the OAH. It had been thought that the OAH had this authority when it obtained additional positions in 1983 for the workers' compensation section. Because of a difference of opinion of the placement of a comma in Minn. Stat. Ch. 43 (1984), this additional authority was requested and obtained. (The positions utilized by these unclassified positions were the positions of administrative assistant and the assistant chief administrative law judge.)

1985

1985 Minn. Laws, Chapter 305, Article 6, Section 15. This law, originally intended to be a recodification of the state liquor laws, amended a provision of law which had previously been interpreted by the Minnesota Supreme Court to allow political subdivisions to suspend or revoke liquor licenses without hiring the OAH even though it had to comply with the other provisions of the APA. During the recodification process, this section of the law was amended so that the political subdivisions, when suspending or revoking a liquor license, are required to use the entire Chapter 14, which thus requires use of an ALJ of the OAH to conduct the hearings.

1985 Minn. Laws, First Special Session, Chapter 4, Section 1. This provision eliminated an exemption previously obtained by the Department of Public Safety from the rulemaking provisions for rules adopted under Minn. Stat. § 169.128 relating to DWI license suspension. This section of the law specifically repealed the rules which had been adopted under the exemption and required the agency to follow the full APA in adopting its rules.

1985 Minn. Laws, First Special Session, Chapter 10, Sections 34 through 38. These sections require the preparation of fiscal notes by agencies for all rules if the rules will result in increased, mandated costs to local agencies. (Of concern is the fact that a new definition of "rule" is added to the law which is not identical to the definition of "rule" in the APA.)

1985 Minn. Laws, First Special Session, Chapter 13. This was the State Departments Appropriations Bill. It contained a number of significant amendments impacting the OAH and the APA as follows:

1. The funding for the workers' compensation section of the OAH was transferred from the state general fund to the special compensation fund. This amendment has the effect of removing the costs of the workers' compensation system from the taxpayers of the state to the employers and insurers, including all state agencies and all self-insured employers.

2. Agencies are specifically prohibited from contracting with persons from outside of their agency for the drafting of rules unless they obtain the approval of the revisor of statutes.

3. The revisor of statutes is required to assess the costs of both drafting rules and reviewing rules directly to the agencies.

4. The attorney general is required to assess the costs of their required review of rules and all other services provided to state agencies to the agencies.

5. The LCRAR, having been faced with an ever-increasing number of petitions for review of rules, obtained a provision amending the APA to specifically allow the LCRAR to request the OAH to conduct hearings for it, the cost of the hearings to be borne by the agencies whose rules were the subject of the hearing, provided that the rules had not been adopted following a hearing conducted by the OAH.

6. The chief ALJ was specifically authorized to adopt procedural rules for voluntary mediation, including rulemaking, except for disputes which were within the jurisdiction of the Bureau of Mediation Services.

7. Amendments to the APA were adopted specifically allowing the chief ALJ to delegate certain responsibilities to subordinates provided that the delegations are filed with the secretary of state. These amendments were necessitated because the secretary of state had indicated that the chief ALJ was without authority to delegate responsibilities.

Other Internal Changes to the OAH.

In addition to the changes discussed above, including legislative changes, during the last four years the OAH has continued its efforts to streamline the office. In this regard, the OAH has continued its search for better ways of managing its calendar of cases. As discussed in Chapter 7, the OAH has developed a computerized program for the scheduling of cases for workers' compensation. This was a result of DOLI obtaining approval for the computerization of its workers' compensation records. As the OAH receives approximately 10% of the total number of cases filed at DOLI, the OAH began utilizing the same computer as had been purchased by DOLI. DOLI had purchased a mainframe computer from the Sperry corporation and its MAPPER software system. Sperry terminals were installed at the OAH and a telecommunications hookup to the DOLI mainframe was installed. While the system was originally "sold" on the basis that employees of DOLI and OAH could very easily learn to prepare the "runs", which were actually computer programs, we found it extremely difficult to train our existing staff to perform this function. Therefore, it was determined that we should utilize salary savings from vacant positions to contract directly with the Sperry Corporation for consultant services to complete the computerization of the records at OAH. This proved to be a cost-effective way of achieving the desired results in the least amount of time possible. However, we quickly found that even Sperry had miscalculated the amount of time necessary to write the runs to computerize the calendar system of the office. However, effective February 1, 1986, the total automation of the record-keeping, assignment of cases, scheduling of cases, issuing of pretrial orders and hearing notices will be accomplished. The end results of this automation will be increased efficiency of the office, quicker response to questions from the public, our calendar judge being able to hear cases 50% of the time, thus increasing the number of cases we are able to dispose of each year, and providing needed managerial reports from the data found in the records of the office which are presently obtainable only through a manual system.

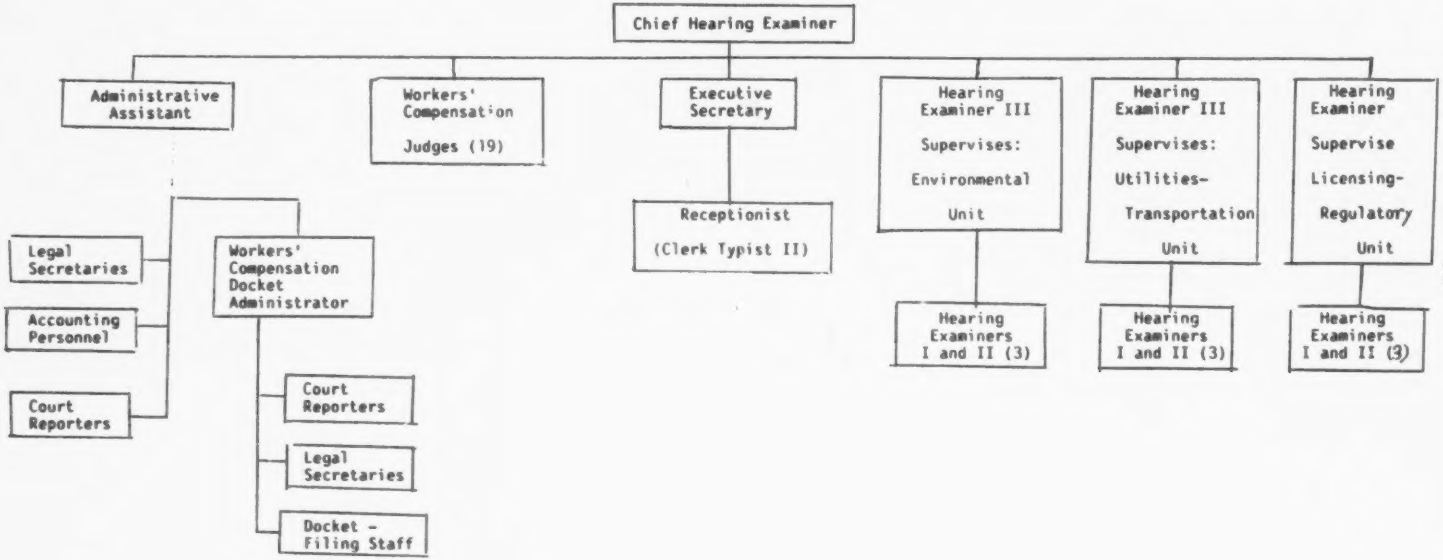
While working on the Sperry system for workers' compensation, the OAH continued to look at methods of upgrading its existing word processing system so as to be able to make its record-keeping and scheduling of cases in the APA section more efficient. During 1985 the office upgraded its existing Wang WP system to a Wang VS 65 system which gives the office both word processing and data processing capability. Software has been purchased to upgrade the time-keeping and billing system of the office so that invoices for services of the office can be generated up to ten days earlier, and to reduce the margin of error in any billings. At the same time, the system will provide the computerization of the docketing and calendaring system. At the present time, cases are docketed manually and are set based upon telephone calls from agencies to the chief ALJ or a supervisory ALJ. It presently takes from ten minutes to 30 minutes to schedule a case depending upon the amount of information necessary before we can notify an agency of the date, time and place of the hearing and the ALJ assigned. The new system will allow the same process to occur in less than three minutes by having terminals in the offices of the supervisory ALJs and the chief ALJ. As in the case of workers' compensation, by entering all of our calendar and docket information on the Wang VS system, we will be able to generate reports much more quickly, will be able to monitor our billings much more carefully, and will be able to respond to questions from the public much more rapidly.

As with most computerized systems, vendors of the systems continue to say that their equipment is "user friendly". However, we have found that it will be necessary for the office to hire a full-time person to continue to monitor and work with both of our computer programs. However, the utilization of the computerized systems has allowed us to reduce the number of support staff anticipated to be necessary so that no new positions will be necessary to fulfill our needs. In fact, it is anticipated (hoped) that the upgrading of our system will result in the reduction of support staff by one and possibly two full-time positions. However, we will not be able to make this final determination until the end of the current biennium.

As a result of the various changes made internally both as required by legislative changes and by attempting to bring more efficiencies to the office, the office established a new organizational structure as of July 1 of 1984. This followed the hiring of an assistant chief administrative law judge to directly supervise the entire workers' compensation unit. Additionally, instead of three units within the APA section, the utilities/transportation unit was combined with the environmental unit for the purpose of supervision. As part of this reorganization of the APA section, ALJs were transferred from one unit to another in order that they may develop expertise in additional areas of the law. This "cross-fertilization" had been occurring over a lengthy period of time. The office has been using ALJs with a high degree of expertise in a given subject matter area to assist in the training of other ALJs. As an example, the office "inherited" five hearing examiners from the public service commission who had expertise in transportation and utility matters. Only one of these five persons remains on the staff today. This person has continued to assist in providing training from his experience and background to other ALJs as we have moved these other ALJs into the utilities/transportation unit. Thus, while the office continues to operate under its mandate of attempting to assign persons with expertise in the subject matter to all hearings, we have continued to utilize nearly all ALJs in all areas. We are able to do this because of the highly professional staff in the office who are willing to work with each other and to assist each other in the fulfillment of their responsibilities under the law.

The organizational structure for the office which was implemented on July 1, 1984, and which remains in effect as of January 1, 1986, if found at the end of this chapter.

MINNESOTA OFFICE OF ADMINISTRATIVE HEARINGS
ORGANIZATION STRUCTURE
AS OF JULY 1, 1981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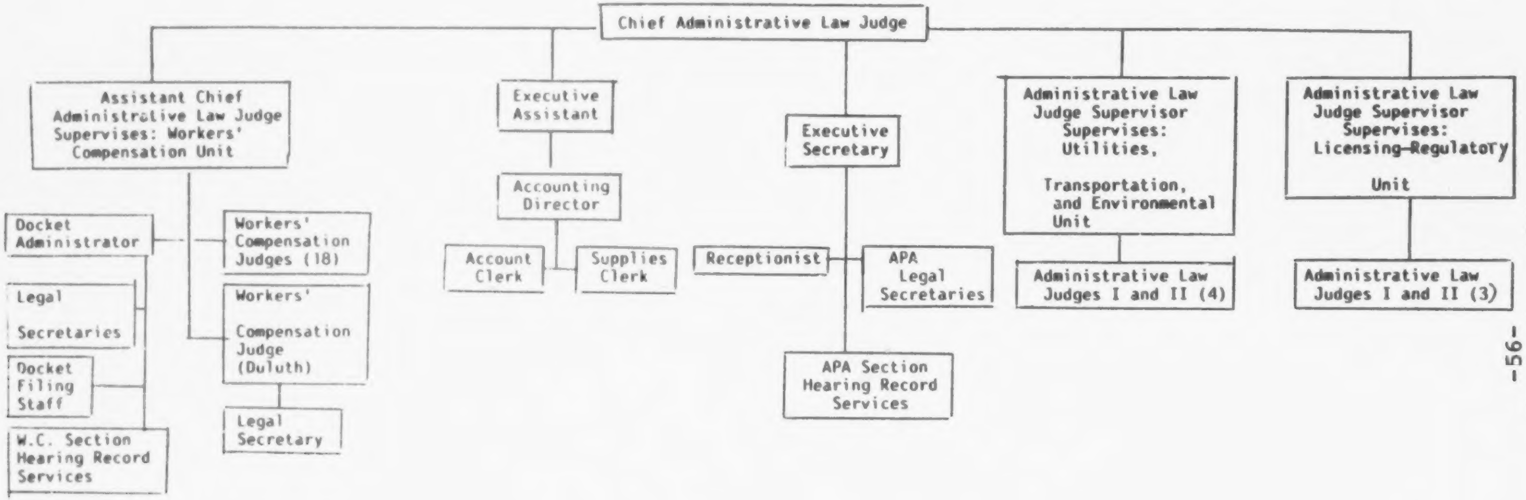
Administrative Assistant
Legal Secretaries
Accounting Personnel
Court Reporters
Workers' Compensation Docket Administrator
Court Reporters
Legal Secretaries
Docket - Filing Staff
Workers' Compensation Judges (19)
Executive Secretary
Receptionist (Clerk Typist II)
Hearing Examiner III Supervises: Environmental Unit
Hearing Examiners I and II (3)
Hearing Examiner III Supervises: Utilities-Transportation Unit
Hearing Examiners I and II (3)
Hearing Examiner Supervise Licensing-Regulatory Unit
Hearing Examiners I and II (3)

MINNESOTA OFFICE OF ADMINISTRATIVE HEARINGS
ORGANIZATION STRUCTURE
AS OF JULY 1, 1984


Chief Administrative Law Judge
Assistant Chief Administrative Law Judge Supervises: Workers' Compensation Unit
Docket Administrator
Legal Secretaries
Docket Filing Staff
W.C. Section Hearing Record Services
Workers' Compensation Judges (18)
Workers' Compensation Judge (Duluth)
Legal Secretary
Executive Assistant
Accounting Director
Account Clerk
Supplies Clerk
Executive Secretary
Receptionist
APA Legal Secretaries
APA Section Hearing Record Services
Administrative Law Judge Supervisor Supervises: Utilities, Transportation, and Environmental Unit
Administrative Law Judges I and II (4)
Administrative Law Judge Supervisor Supervises: Licensing-Regulatory Unit
Administrative Law Judges I and II (3)

Chapter 9

A Look to the Future

Recommendations for Change

The creation of the independent OAH has been hailed by some as the greatest advancement in bringing credibility and professionalism to state administrative law practice since the first adoption of an APA in this state. On the other hand, there are those that are heard to say that the creation of the OAH has merely added another layer of bureaucracy to state government, results in too much formality in many hearings, is time consuming and costly, fails to deliver necessary expertise and is an infringement on the decisionmaking authority of state agencies. Not too surprisingly, the supporters come from the legal profession and the private sector while the detractors come primarily from within state agencies and representatives of some special interest groups, both yearning for the return of the "good old days". Exactly what is meant by the "good old days" is better left to the reader's imagination. However, no persons have been heard to dispute the fact that the creation of the OAH has brought uniformity in both procedures and decisionmaking format to the administrative process as well as being a giant step toward bringing governmental action into the "sunshine".

A prime example of why the interjection of an independent, professionally trained fact finder is important to the integrity of the administrative process is the recent discussion relating to the propriety of commissioners, directors or other agency heads working for those they regulate either prior to or subsequent to their employment in state government. It is a fact of life that those regulating a particular industry must have some amount of expertise in the subject matter of the laws. This expertise only comes from practical experience prior to appointment or "on the job" learning experiences. Part of the job of regulating is to come into frequent contact with those being regulated. To do otherwise would be to keep one's head in the sand and remain ignorant of what is happening in the "outside world". State agencies' personnel are in a "no win" situation in this regard. On the one hand, if they refuse to meet with or talk to those regulated by the agency, they are accused of ignorance of the industry, egotism, and shortsightedness. On the other hand, if they are seen to meet with those regulated, they are accused of "selling out" to or being "in bed with" the regulated industry.

The OAH brings a reasonable buffer into the process by providing an open forum for discussion of ideas (in rulemaking), requiring agencies to make a full and complete record prior to their decisionmaking, and through the insertion of an impartial fact-finder. Lest there may be those who would scoff at the importance of the impartial fact-finder, case after case coming from the Minnesota courts have indicated quite clearly the importance of the process. Agencies cannot ignore the findings, conclusions and recommendations of an ALJ. Rather, agency decisionmakers must show a familiarity with the record of the proceedings[67], may not merely rubber stamp the ALJ's report[68], and must clearly explain any divergence from the report, pointing to evidence in the record supporting rejection of the ALJ's findings or recommendations.[69] Agencies may reach their own conclusions in a case but if they are different from the ALJ's, the difference must be explained.[70]

The OAH has tried to listen to its critics and to respond to constructive criticism or positive suggestions for improvement. The use of an internal policy relating to the implementation of a uniform format for the issuance of contested case reports in November of 1980 was the result of discussions with state agencies and lawyers appearing before the OAH. The legislative adoption of new procedures allowing agencies to take certain licensing actions without first conducting a hearing was a direct result of discussions with agencies and practitioners who were heard to complain about costs and delays.[71] the adoption of a "notice and comment" rulemaking process for noncontroversial rules in 1980[72] was first proposed to the 1979 APA Task Force by the OAH after discussions with agencies and a review of past rulemaking hearings. The implementation of an anonymous questionnaire which is sent to parties to a hearing following issuance of the ALJ's report was due in part to comments from attorneys who had some reluctance to lodge complaints about an ALJ and in part due to our looking for better ways of evaluating the performance of the ALJ. The implementation of a formal training program which includes training in areas of substantive law such as workers' compensation, discrimination law, public utilities regulation, etc. is in response to the need for subject matter expertise while courses on alternative dispute resolution are the result of persons seeking less onerous procedures for resolving disputes. In 1984-85 the OAH attempted to amend its procedural rules to provide for less formal procedures for certain classifications of contested cases. While everyone supported the effort, it failed due to a lack of statutory authority to adopt classifications and thus "mandate" specific procedures for certain types of cases.

While attempting to respond to constructive criticism and positive suggestions for change, as well as being mindful of its charge to conduct fair, expeditious and less costly hearings, the OAH has also continued to monitor the APA, changes proposed, and to provide a neutral position in many legislative discussions relating to the APA. The OAH has taken the position that the purpose of the APA is to provide a uniform and open administrative process whereby agencies proposing action must establish the reasonableness of their proposed action, prove their case, before they can take any action, while at the same time providing an opportunity for the public to participate fully in the administrative process. In so doing, the OAH has sometimes taken positions on proposed legislation which has been viewed as anti-state-agency or pro-state-agency, depending on the nature of the issue, the position taken, and the viewpoint of the critic. The old adage that 50% of the people will be upset with a decision regardless of which way it goes therefore applies not only to decisions issued by the OAH but in its legislative proposals.

The numerous changes to the APA over the past decade, as enumerated in preceding chapters, have done much to improve the process by which governmental agencies establish policies and take actions which affect the lives of the citizens of this state. However, even though the Minnesota APA presently imposes what most consider to be the most onerous, time consuming and costly requirements for rulemaking in the country, there remain those who believe that even more stringent requirements should be imposed in order to correct actual or perceived "loopholes" or problems in the rulemaking process. When discussing the existing provisions relating to adjudicative proceedings (contested case) concerns continue to be expressed although not as often nor as loud as when discussing rulemaking. The OAH shares some of these views while at the same time remains concerned that in attempting to correct the deficiencies, more problems might be created.

The OAH supports a continuing review of the administrative process. However, rather than a piecemeal or "band-aid" approach which has occurred from 1976 to 1985, perhaps it is time to step back and take a comprehensive look at the entire APA just as was done in 1974-75. Much has happened in the field of administrative law over the past decade, not just in Minnesota but nationwide. A new Model State APA has been published by the National Conference of Commissioners on Uniform State Laws. There are now ten states which have adopted provisions creating an independent agency much like the OAH while 18 other states and the United States Congress are presently considering similar legislation. There have been numerous decisions issued by the United States Supreme Court, the Minnesota Supreme Court and the Minnesota Court of Appeals relating to administrative practice and procedure which should be reviewed for the purpose of codifying or legislatively overruling them. With these factors in mind as well as the problems previously discussed, the following recommendations for discussion or change are being proposed.

Rulemaking

A. The LCRAR's rule suspension authority should be repealed because of its very questionable constitutionality. Instead of creating a new joint legislative commission on regulatory oversight as is being discussed for the 1986 Legislative Session, the role of the LCRAR should be reviewed and, if deemed appropriate, expanded to include the functions presently being proposed for the new joint commission. For those that fear that loss of rule suspension authority will result in a diminution of the effectiveness of the LCRAR, consideration should be given to the provisions of sections 3-203 and 3-204 of the 1981 Model State APA. Those sections are all encompassing and in some instances have proven effective in other states. Of particular significance to those sections is the authority of the commission to "object" to the provisions of a proposed rule. Unless the objection is removed, if a rule is challenged, the burden is upon the agency to establish that the whole or portion thereof objected to is within the procedural and substantive authority delegated to the agency. At present, a person challenging a rule has the burden of proof at court. This shifting of the burden of proof has proved to be an effective legislative oversight mechanism in the State of Florida.[73]

B. Agency Bulletins. As discussed in Chapter 2, the issuance of bulletins or guidelines by agencies was one of the prime motivating factors behind the 1975 APA amendments. Recently, the same issue has come to the attention of at least one legislative committee.[74] The issue is: How can agencies effectively communicate with those regulated by the agency without constituting illegal rulemaking? The APA and court decisions are very clear. Rules must be adopted, amended, suspended or repealed only in compliance with the APA. Any agency statement of general applicability and future effect made to implement or make specific the law administered by the agency which has not gone through the APA requirements is unenforceable. How then can an agency very quickly inform the regulated of changes required by court decisions or federal law or regulations which would, in effect, amend a duly adopted rule? When an agency issues an advisory opinion, where authorized, or a precedential policy decision following a contested case, how can it inform the regulated without being accused of illegal rulemaking? When an agency has issued a statement which looks like a rule but which has not been adopted as a rule, how can a person obtain a determination of the legality question prior to an enforcement action challenge? If an agency issues an "Order" rather than a "rule", and the order is intended to have the effect of a rule but has not been issued following an adjudicative proceeding, what recourse does a person have other than a judicial challenge? The following suggestions to correct these problems are not meant to be the "only way" but may serve to further discussions which will hopefully result in a proper solution.

1. Amend the definition of "rule" as presently found at Minn. Stat. § 14.02, subd. 4 (1984), as follows: "'Rule' means the whole or a part of every agency statement of general applicability and future effect, including amendments, suspensions, and repeals of rules, issued or adopted to prescribe law or policy, implement, interpret or make specific the law enforced or administered by it or to govern its organization or procedure. Every agency statement that meets this definition is a 'rule' regardless of whether the agency labels the statement with another term, such as a policy, informational, interpretive, or instructional bulletin or statement."

The foregoing proposal is a combination of the existing definition of "rule", the definition contained at section 1-102(14) of the 1981 Model State APA, and a recently drafted proposal of Mark Shepard of the House Research staff, who is currently assigned to the House Governmental Operations Committee. The intent of these amendments is not to broaden the definition but to make it more specific so as to provide clearer guidance to state agencies' personnel.

2. As is recommended by the 1981 Model State APA at section 1-104, allow for the suspension of the requirements of the APA when necessary to avoid a loss of federal funds or services. The suspension authority should vest in the Attorney General so that a legal determination of the necessity for the suspension can be made. Placing this authority in the Attorney General will provide a check by a constitutional officer separate from the executive branch agency requesting the suspension. The suspension order should not be subject to the APA requirements for rule adoption as recommended in the Model Act,for to do so would delay the action, possibly resulting in a loss of the federal funds or services sought to be preserved. The proposed language is as follows:

"To the extent necessary to avoid a denial of funds or services from the United States which would otherwise be available to the state, the attorney general by order may suspend, in whole or in part, one or more of the rulemaking provisions of this act. The attorney general by order shall declare the termination of a suspension as soon as it is no longer necessary to prevent the loss of funds or services from the United States. The issuance of the order is not subject to the provisions of this chapter.

If any provision of this act is suspended pursuant to this section, the attorney general shall promptly publish the order of suspension in the State Register and report the suspension to the legislature.

Any suspension issued pursuant to this section shall apply solely to the agency seeking the suspension and solely to the rules required to be adopted, amended, suspended or repealed. An agency which receives a suspension order from the attorney general shall immediately publish the required changes in the State Register and give immediate notice to all persons whose names are registered with the agency for the purpose of receiving rulemaking notices.

3. In cases where an agency has issued a statement which may be thought to be a rule without compliance with the APA, a procedure for immediate review should be established outside of the judicial

system. One proposal is for a petition to be filed with the LCRAR. That proposal is contained in a draft of legislation prepared by Mark Shepard of the House Research staff.[75] That proposal appears to call for what could be lengthy procedures, but is certainly worth review. An alternative is to provide for an administrative review which could be conducted under strict timeliness. Guidance for such a provision can be found in the rulemaking procedures in the Florida APA.[76] In Florida, once a rule is proposed or even after adoption, a limited challenge can be made by petition to the director of the Florida Division of Administrative Hearings. The decision of the ALJ is a final determination. The proposal for Minnesota would be to allow a petition to be filed with the chief ALJ with a copy to be served on the agency which issued the statement in question. Within a very short time (3 to 5 working days) the agency must give notice to all persons on the agency's rulemaking list for the subject matter of the statement, or to all persons who received the statement in question, the notice giving the date, time and place for any interested person to appear or present oral comment. The hearing would be limited solely to the issue of determining whether the agency statement in question involved illegal rulemaking, the ALJ's decision being a final decision subject to judicial review by the Court of Appeals and the Supreme Court. Short and specific time deadlines for the hearing, the decision and the appeals should be included.

C. Exemptions. Besides the problem of agencies issuing statements which may be rules, a more pervasive problem is the existence of a very large number of exemptions from the rulemaking provisions of the APA. These exemptions fall into three categories, the first being found in Minn. Stat. § 14.02, subd. 4 (1984), the second and more difficult to ascertain being those found "hidden" in the many substantive laws and statutes, and the third being agencies given authority to do certain things "by rule or order". Each of these categories have caused problems of one kind or another. Each year since 1981 the Revisor of Statutes has attempted to identify newly enacted exemptions. In 1984, the chief ALJ, with the help of the revisor, conducted a review of all known or discoverable exemptions. Before that review could be totally completed, the 1985 Legislative Session began and additional exemptions were created.

The review of the exemptions found that there are nine exemptions specifically listed in Minn. Stat. § 14.02, subd. 4 (1984) (as amended by 1985 Minn. Laws, First Special Session, Ch. 4, Sec. 1, which removed an exemption for the department of public safety) of which two are susceptible of questioning with regard to the necessity for the exemption. In the 1984 compilation of the Minnesota Statutes, the revisor listed an additional eleven exemptions in a footnote. The 1984 review by the chief ALJ included a review of 64 exemptions from the rulemaking provisions, including those discussed above. Of the exemptions reviewed, 21 appear to be questionable as to their propriety or necessity. All should be listed in the APA, at the very least so that persons looking for exemptions will only have to look in one place. (Exemptions created in 1985 are not included in these figures.)

A more difficult problem is the issuance of orders rather than rules. When a law authorizes agency action "by rule or order", is the language intended to allow the issuance of a "rule" without compliance with any APA requirements? Apparently, there is some concern that this question is being answered in the affirmative by some agencies. If this is true, then a clarification is appropriate.

The drafters of the 1981 Model State APA also wrestled with this distinction. In section 1-102, the definition section, the Model Act defines "agency action", "order", and "rule". Each of the definitions must be read in conjunction with the other. The stated purpose of the Model Act provisions is to identify every type of agency activity impacting on the citizens, to establish procedures for the issuance of all actions and to provide for judicial review. The definition of "order" [Sec. 1-102(9)] is clearly intended to apply to agency action taken following an adjudicative (contested case) proceeding. The Minnesota APA should follow the lead of the Model Act and codify what most believe has been the historical intent of the legislature. In short, this is one of the possible "loopholes" mentioned earlier as a concern to some.

Adjudicative (Contested Case) Proceedings

Unlike the rulemaking provisions of the APA, the contested case sections have had very few significant changes during the past decade. While rulemaking has a much broader impact on more people in less time, the most significant cases conducted by the OAH in terms of media attention, legislative interest, costs to the participants, and financial impact on the litigants have been adjudicative proceedings, called "contested cases" under our APA. The OAH has routed high voltage transmission lines, sited large electric generating facilities (power plants), considered the need for expansion of the spent nuclear fuel pool at a nuclear powered generating facility, considered hundreds of millions of dollars in utility rates, been asked to sort through allegations of child abuse, sex abuse, discrimination of every kind and nature, fraud and misrepresentation, considered rates for long term care facilities for the aged and the retarded, and has considered evidence relating to licensing of every regulated occupation and profession except attorneys. Yet, whenever "regulatory reform" is mentioned, only rulemaking is discussed.

It could be argued that as long as there are no concerns being publicly expressed, why "rock the boat"? However, just because there is no large outcry for changes does not mean that the system cannot be made better nor that it is free from problems. It must be remembered that agencies establish policy not only through rulemaking but also through the issuance of orders/decisions following an adjudicative proceeding. As but one example, the Public Utilities Commission establishes policy for the regulation of public utilities rates each time it considers an individual rate case. It can, and has, changed policy on such things as the treatment of charitable contributions on a case-by-case basis. It is through the adjudicative process that agencies interpret statutes where rules are inappropriate, unauthorized or not yet adopted, or interpret their rules where necessary. Thus, can a case be made for the proposition that these proceedings are just as important as rulemaking, especially when an agency considers rulemaking too costly or lengthy and chooses to issue policy on a case by case basis?

The existing APA provisions relating to adjudicative proceedings are in need of review and change in many respects. Costs and delays in the process have been greatly reduced since 1975 but can be reduced further. At the same time, there are exemptions from these provisions, some historical and some new, which are in need of review. The following are some areas for discussion with, in some instances, proposals for change. Decisions were made in the past based upon many factors, not the least of which were political factors. If the same factors do not exist today, perhaps changes should be made. At the very least, a discussion of the issues may lead to the discovery of changes other than those discussed herein which should be made.

A. Publication of Precedential Decisions. Agencies establish statewide policy through adjudicative proceedings. It is a case-by-case process where, usually , only one specific party and the agency are present. Yet, a final determination can have applicability to all other persons similarly situated. The determination in one case is applied as "precedent" in all future similar cases. These precedential decisions are not presently published, indexed or otherwise generally available to the public. The 1981 Model State APA, at section 2-102 speaks to this problem by imposing certain requirements on all written orders before they can be relied on as precedent.

It is recommended that section 2-102 of the 1981 Model State APA, as well as section 1-102(9) which defines "order", be adopted into the Minnesota APA, modified as may be necessary or appropriate.

B. Alternative Dispute Resolution (ADR). Since the legislature mandated a study of this subject, the LCRAR, the State Planning Agency, the Attorney General's Office, the Director of the Bureau of Mediation Services and the chief ALJ have been involved in reviewing ADR. While a final report on this study has not yet been issued, several general conclusions have been reached and several actions have been taken. After several discussion sessions, a short mediation training was provided to the ALJs at the OAH. Thereafter, the departments of human services and natural resources, selected as pilot agencies, reviewed their cases prior to referral for hearing to determine the appropriateness of the cases for mediation. At the same time, ALJs began a review of all cases referred to them to determine their appropriateness for mediation. Procedural rules for voluntary mediation of contested cases were adopted by the OAH. Legislation specifically authorizing mediation of rulemaking was passed in 1985 as previously discussed.

The conclusions reached have been that mediation in the classical labor-relations setting is not appropriate in all contested case proceedings but most contested cases are susceptible to some form of mediation or settlement conference. Another conclusion reached is that state agency personnel need training in mediation/settlement techniques and must be given authority to settle all or portions of disputed issues when attending mediation/settlement conferences. Due to the very high success rate (nearly 100%) in cases mediated to date, the study should continue with greater emphasis placed on training of all agencies' personnel to not only spot cases where settlement is possible, but in the art of settlement discussions. A positive ADR program will save the state and its citizens both time and money and will result in participants turning a "win-lose" or "lose-lose" situation into "win-win".

C. Classification of Adjudicative Proceedings. Because these cases vary so greatly in nature and scope, the formality of the hearings should also be varied so that the issues can be determined in the most timely and cost-efficient manner possible. An ALJ ruled that the OAH is without authority to classify the hearings, a task that was proving to be very difficult at best and one more probably belonging to each agency, subject to general guidelines. The 1981 Model State APA, Article IV, addresses this problem.

It is strongly recommended that the legislature adopt the Model Act concept for classification of adjudicative proceedings. The specific Model Act provisions must be modified to fit the existing Minnesota APA but the concept will work in Minnesota and was the subject of unanimous support at public hearings conducted in 1984. The disagreements arose over which cases were to fit into each of the categories. The Model Act places all cases under the formal procedures until the agencies have, by rule, classified their own hearings within the guidelines found in the Model Act. This same procedure should be workable in Minnesota.

D. Delays in Issuing Final Decisions. Minn. Stat. § 14.62 requires all agencies to render a written decision within 90 days of receipt of an ALJ's report. However, if an agency fails to act, the party seeking a final determination is required to hire an attorney to bring an action against the agency in the Minnesota Court of Appeals. The court may only require the agency to issue a decision "within such time as the court determines to be appropriate". There are no provisions allowing for the recovery of costs, damages or attorney's fees in any case where the agency has unreasonably delayed taking action. The 90-day requirement was added to the law in 1980.[77]

Even with this existing provision, agencies continue to unreasonably delay final action to the detriment of the other party. The most recent example is a case wherein the ALJ's report in a licensing case was issued on April 18, 1984, 15 days after the hearing. There were no exceptions filed by any party. The final agency action, which adopted the report and recommendation of the ALJ in its entirety, was not issued until January 16, 1986. The final decision dismissed the proposed action against a licensee. Pending the final decision, the licensee was left in a state of limbo, arguably to the licensee's financial detriment and most certainly to the detriment of the licensee's emotional condition and respect within the community.

To correct this problem, it is recommended that the legislature adopt the 1981 Model State APA's concept of an "initial order". Under this concept, the ALJ would issue an "initial order" rather than a recommendation. the "initial order" would become the final order unless within ten days the agency head gives notice that the initial order will be reviewed, or upon appeal by any party to the agency head within the same time frame. Thereafter, a specific time deadline should be established for the issuance of a final order by the agency which is mandatory rather than directory, with possible provisions for costs, damages and attorney's fees in the event a decision is not issued within the statutory deadline.

Some might say that this recommendation is "overkill" or that all agencies should not be required to pay the consequences of dilatorious actions of a few agencies. After observing the process for over ten years, I doubt that there are more than a handful of agencies which can honestly state that they have issued all decisions within 90 days. At the same time, when agencies are faced with deadlines which, if not met, will result in the agency losing jurisdiction to take action or funds from its budget, they meet the deadlines.

E. Licensing Cases. Final agency decisions in occupational and professional license disciplinary cases seldom, if ever, involve the issuance of a decision which establishes statewide policy. Rather, they involve an investigation by the agency, a preliminary determination by the agency that the licensee has violated some provision of law or rule, prosecution by the agency, an ALJ's recommendation that disciplinary action be taken or not taken, and a final decision by the agency on whether disciplinary action should be taken and if so the extent of the discipline. At the hearing, the agency must prove its allegations by a preponderance of the evidence which is the lowest standard of proof commonly recognized in civil proceedings.

Several issues have been raised in conversations with practitioners in this area over the past several years. The first issue raised is whether the standard of proof necessary before a licensee can be disciplined should be the higher "clear and convincing" standard. The second issue raised is whether the ALJ should recommend a specific penalty if a violation is proved. The final issue is whether the ALJ's decision should be a final decision rather than a recommendation. These issues and recommendations are discussed below.

1. Standard of Proof. It has been said that "preponderance of the evidence" means that if the scales of justice are tipped ever so slightly to one side of the case, that side wins. This is the standard of proof presently applied in all contested cases unless the substantive law provides otherwise. Using a standard such as this does not mean that the party with the most evidence or largest number of witnesses prevails. It is not the quantum of evidence which counts but the quality of the evidence which is important. The "clear and convincing evidence" standard is somewhat higher and requires a better quality of evidence so that the trier of fact is "clearly convinced" of the truth. The trouble with this standard is in its application. We are not faced with jury trials. Rather, a party must convince one person, except in the case of a board, of the merits of their argument. Who is to say whether that fact finder is clearly convinced or merely convinced? In short, does it really make any difference? I think not. therefore, it is recommended that the legislature adopt, by statute in lieu of the present rule, the preponderance of evidence standard of proof for all adjudicative proceedings unless the substantive law provides a different standard.

2. Specificity of Recommendations. At the outset of the establishment of the OAH and adoption of its internal policies and procedures, it was decided that in cases involving disciplinary actions against licensees, no specific penalties would be recommended. Rather, if the ALJ finds that the licensee has violated the applicable law or rules, the recommendation is solely that disciplinary action be taken or if no violation is found to have occurred, that no disciplinary action be taken. In some cases this has led to controversy , not only from the public but from within the OAH. Nevertheless, once established, it was felt that we should maintain uniformity and the policy remains today.

It is now recognized that the policy was not correct and that all cases involving disciplinary action should result in a specific recommendation as opposed to the present general recommendation. However, before unilaterally making such a change, it was thought that it would be more appropriate to present the issue to the legislature for its consideration and recommendation or for specific statutory guidance.

The arguments against proposing specific penalties include the theory that it invades the jurisdiction of the agency to establish policy through the imposition of penalties and that it is the agency's responsibility to determine what penalty would be in the "public interest", which is the standard in several licensing statutes. The other side of the coin is that the agency should be required to state, at the outset, the penalty it seeks to impose so that the licensee can better understand the implications of an adverse determination and make a more informed decision on any possible settlement. Another argument is that the state should be required to establish the necessity for discipline and the reasonableness of the specific proposal plus the "public interest" evidence where appropriate.

A survey of other states which utilize an independent agency to determine licensing cases indicates that every one of those agencies make specific disciplinary proposals. The OAH recommends that the legislature review this issue and specify its intent through legislative enactment. If the legislature discusses the issue but takes no action nor makes any recommendation one way or the other, it is the intent of the OAH to change its present policy and to begin issuing specific disciplinary action where appropriate.

3. Finality of Decisions. In all cases where the final decision in an adjudicatory proceeding requires the exercise of agency expertise or represents the exercise of a legislative function of establishing policy for the state, the agency should make the final determination rather than the ALJ. However, where the agency has investigated a matter, made a preliminary determination of guilt through its decision to proceed, conducts the prosecution of the case, where an adverse determination may result in the lose of a person's right to conduct a business or pursue a profession and where a final determination does not require the exercise of any special expertise, where should the final decisionmaking authority rest?

On this issue, final decisions are made by independent agencies such as the OAH in the states of California, Missouri, Maine, North Carolina, Wisconsin and Florida in most licensing cases. It is our recommendation that the legislature consider this issue and determine where the final decisionmaking authority belongs. Bringing the issue up for discussion and making a decision one way or another will put this issue to rest.

F. Exemptions. As in the rulemaking provisions, when the APA was amended in 1975, certain exemptions from the contested case provisions were created for one reason or another. As an example, while the Minnesota Municipal Board exemption at Minn. Stat. § 14.03, subd. 1 (1984), was exempted under the guise of the expertise argument, in fact, if it was not able to continue to conduct its own hearings, there would have been little for the Board or its executive director to do.[78] The exemption for unemployment compensation, workers' compensation and hearings conducted by the Bureau of Mediation Services were also based on the expertise argument. However, as those present at the time are aware, that was not the real reason. They were exempted based solely on political reasons, which is entirely proper for a legislative process which, by its nature, is political. As discussed in a previous chapter, the exemption for workers' compensation hearings was partially repealed in 1981 when the workers' compensation judges were transferred to the OAH without a loss of expertise. Why the rest of the workers' compensation division at the department of labor and industry remained exempt was never fully discussed nor explained in 1981.

Some exemptions are appropriate. For example, agencies such as the public employment relations board and the workers' compensation court of appeals, whose sole hearing functions are on appellate review rather than initial hearings, are appropriately exempt. However, the same cannot be said for other exemptions listed within the APA nor for most of those found within other sections of the statute. The revisor has located these exemptions and has published the list as a footnote to Minn. Stat. § 14.03. In 1984, these exemptions were reviewed at the same time as the review of the rulemaking exemptions. Of the total of 35 exemptions reviewed, including those found in Minn. Stat. § 14.03, subd. 2, 17 were found to be of questionable necessity. It is recommended that these exemptions be reviewed along with the questionable rulemaking exemptions. (The foregoing did not include a review of any exemptions which may have been granted in 1985.)

Conclusion

The OAH has completed ten years of existence which is considerably longer than many of its earlier detractors would have guessed or desired. Today, it is a fixture in state government as one of ten central panel systems for administrative hearings in existence in the country. The statistics presented in this report should show that the goals established for the OAH through the 1975 legislation, uniformity of proceedings, reduction of delays and costs of the administrative hearing process, and independent decisionmaking, free from political pressure, have been achieved.

What will happen to the OAH in the future is dependent upon legislative action. At some future time, the remaining exemptions from the APA contested case provisions will probably be removed and all adjudicative hearings brought under a single agency. Either the political reasons for the exemptions will dissolve or pure economics will dictate the consolidation, either in total or at least under one roof with separate directors so that the presently existing duplication of support staff functions such as typing, scheduling, etc. will be eliminated. Whether it will happen next year, within five years or twenty-five years does not really matter. My only hope is that Minnesota will remain a leader in this effort and that total consolidation happens first in Minnesota.

FOOTNOTES

1. 1975 Minn. Laws, Ch. 380, § 60.
2. Shepard, Mark; "Administrative Rulemaking Procedure in Minnesota", 1977-1978.
3. 1945 Minn. Laws, Ch. 452
4. Shepard, Supra.
5. 1945 Minn. Laws, Ch. 590.
6. 1957 Minn. Laws, Ch. 806.
7. Minn. Stat. § 15.0412 (4) (1957).
8. Nobles, James and Wallace, Marcy; "A legislative research report on the Minnesota APA", 1975.
9. 1961 Minn. Laws, Ch. 136.
10. 1963 Minn. Laws, Ch. 633.
11. 1963 Minn. Laws, Ch. 822.
12. 1969 Minn. Laws, Ch. 9, § 6.
13. 1974 Minn. Laws, Ch. 344.
14. 1967 Minn. Laws, Ch. 864, § 4.
15. 1969 Minn. Laws, Ch. 1129, Art. 4, § 5 (M.S. 45.032).
16. 1967 Minn. Laws, Ch. 897, § 20 and 1969 Minn. Laws, Ch. 975, §§ 11-13.
17. 1973 Minn. Laws, Ch. 688, § 3, subd. 8.
18. 1973 Minn. Laws, Ch. 732, § 15.
19. 1967 Minn. Laws, Ch. 882. See also generally Minn. Stat. Chs. 115 through 116G.
20. Nobles, James R. and Triplett, Thomas, "A Staff Report to the House and Senate Governmental Operations Committees on the Minnesota Administrative Procedures Act and its Current Application", (January 22, 1975).
21. Ibid.
22. Information obtained in conversations and meetings with William Brooks from 1972 through present.
23. Peter S. Popovich was appointed to the position of Chief Judge of the Minnesota Court of Appeals upon its inception in 1983.
24. James Nobles was subsequently appointed by the legislature to serve as Legislative Auditor, where he continues to serve with distinction.
25. Thomas J. Triplett was appointed as counsel to the Governor during the first term of Governor Rudy Perpich (1977-78), served as a vice president of the Minnesota Project from 1978-1982, conducted hearings under contract to the OAH from 1980-1982, was appointed to the position of State Planning Director by Governor Rudy Perpich in 1983, and was appointed Minnesota Commissioner of Revenue in 1985.
26. Information obtained in conversations with James Nobles, then a member of the staff of the House Research Department, and Thomas J. Triplett, then a member of the staff of the office of Senate Counsel, Representative Harry A. Sieben and Senator Winston Borden, authors of the 1975 APA legislation. This information was also obtained through my personal observation of the legislative committee hearings.
27. Nobles and Triplett, Supra note 20.
28. Triplett, Thomas J. and Nobles, James R., "Rule-making Under Minnesota's Administrative Procedure Act: 1975 Amendments", Hennepin Lawyer, pp. 14-17 (July-August 1975).
29. 1974 Minn. Laws, Ch. 355, § 69.
30. Minn. Stat. 1984, §§ 14.39 through 14.45 as amended by 1985 Minn. Laws, First Special Session, Ch. 13, § 84.
31. 1975 Minn. Laws, Ch. 380, § 1.
32. Id. at § 16.

33. Id.
34. Id. at § 2.
35. Id. at §§ 7 and 16.
36. Id. at § 1, subd. 3.
37. Id. at § 1, subd. 2.
38. Id. at § 16.
39. Id. at § 16, subds. 1 and 3.
40. Id. at § 16, subd. 9
41. Id. at § 16, subd. 3.
42. Id. at § 19.
43. Id. at § 16, subd. 6.
44. Id. at § 16, subd. 2.
45. Id. at § 16, subd. 4.
46. Id. at § 16, subd. 5.
47. Id. at § 23.
48. 1976 Minn. Laws, Ch. 131, § 1, later codified as Minn. Stat. § 256.045.
49. 1976 Minn. Laws, Ch. 68, § 2.
50. 1977 Minn. Laws, Ch. 203, §§ 1-3.
51. 1984 Minn. Stat., § 171.18.
52. 1976 Minn. Laws, Ch. 341, § 2, subd. 3 (Minn. Stat. 1984, § 169.127, subd. 3).
53. 1977 Minn. Laws, Ch. 346. The legislation applied to the Ethical Practices Board, livestock marketing bond claims and wholesale produce dealer bonds at the Department of Agriculture, industrial loan and thrift applications at the Department of Commerce, ambulance services at the Department of Health, licensing of hairdressing/beauty schools, petitions for motor carrier permits at the Public Service Commission, and railroad crossing permits and authority to eliminate agency service or remove trackage heard for the Department of Transportation.
54. Minnesota-Dakotas Retail Hardware Association v. State, 279 N.W.2d 360 (1979).
55. 1975 Minn. Laws, Ch. 380, § 16, subd. 3.
56. 1981 Minn. Laws, Ch. 346, § 141.
57. Id. at § 7.
58. Id. at § 4.
59. Id. at § 141.
60. Id. at § 106.
61. 1983 Minn. Laws, Ch. 290, § 149.
62. 1983 Minn. Laws, Ch. 290.
63. 1981 Minn. Laws, Third Extra Session, Ch. 2, Art. 1, § 2.
64. Id. at § 10.
65. 1981 Minn. Laws, Ch. 2, Art. 1, §§ 25 and 26.
66. 1983 Minn. Laws, Ch. 290, § 156.
67. PEER, Inc. v. MEQB, 266 N.W.2d 858 (Minn. 1978).
68. Supra.
69. Beaty v. Minnesota Board of Teaching, 354 N.W.2d 466 (Minn. App. 1984); Brinks, Inc. v. Minnesota Public Utilities Commission, 355 N.W.2d 446 (Minn. App. 1984).
70. Supra.
71. 1977 Minn. Laws. Ch. 346.
72. 1980 Minn. Laws, Ch. 615.
73. Discussion with Sharyn Smith, Director, Florida Division of Administrative Hearings, October 1985.

74. On January 10, 1986, Representative Robert Waltman, Chair of the House Governmental Operations Committee's subcommittee on administrative procedures conducted a hearing on the question of agency bulletins versus formal rulemaking.
75. See January 9, 1986, draft of legislation to amend Minn. Stat. § 14.40 (1984), revisor's number [RESDEPT] MS/fa R27000.
76. Florida Statutes § 120.56 (1983).
77. 1980 Minn. Laws, Ch. 615, § 18.
78. Information obtained from former executive director of the board who was responsible for obtaining the exemption and who is now an ALJ at the OAH.

Senator DECONCINI. I just did not want to cut you off if you had anything else that you wanted to get in.

Mr. Rosenblum, do you have any statement that you want to submit or anything?

Mr. ROSENBLUM. No, sir.

Senator DECONCINI. OK. I have one question for Ms. Mills. In your statement, you talk about one ALJ—that there was a rate of reversal of denials in his region of 50 to 60 percent 2 years ago; it is now around 90 percent.

Do you have any information if that is widespread in the home health agencies, or is this just the worst one you could find?

Ms. MILLS. No, sir. It is widespread.

Senator DECONCINI. Do you have any figures or anything to back that up? I do not dispute you. I just would like it for the record. If you could furnish us several examples of that, I think it would be very helpful what the change has been on the reversal of denials.

Mr. ROSENBLUM. Senator, I can speak directly as to the figures where we cited 29 reversals in 30 cases for ABC. I have been representing the company in those cases and that has been the reversal rate, and I can give you statistics on that for the last 1½ years.

Senator DECONCINI. In one region?

Mr. ROSENBLUM. Yes, sir.

Senator DECONCINI. Yes.

Mr. ROSENBLUM. But Ms. Mills also is president of the American Federation of Home Health Agencies and can get statistics from other parts of the country.

Senator DECONCINI. You can do that?

Ms. MILLS. I can provide statistics from throughout the country.

Senator DECONCINI. That would be very helpful if you could submit that to the committee, whatever you are able to put together, in different regions of what that percentage was 2 years ago and what it is today, or whatever period of time; to be fair, have it the same in each region.

Ms. MILLS. I was at a meeting about 9 months ago at HCFA region IV in Atlanta with some ALJ's, and at the time in region IV the reversal rate was 95 percent for 1986.

Senator DECONCINI. And did they indicate what it was 2 years before that?

Ms. MILLS. They did not indicate at that time, but I can get those stats.

Senator DECONCINI. You will be able to find out. Thank you very much.

I have no further questions. I want to thank you very much for your testimony and the information that you will be submitting to the committee. The subcommittee will stand in recess at the call of the chairman. This record will remain open for 2 weeks if anybody wants to submit additional information.

Thank you.

[Whereupon, at 9:41 a.m., the subcommittee was adjourned.]

[Questions and answers, subsequently received for the record, follow:]

QUESTIONS

by Senator Howell Heflin

for Margie Mills

1. Ms. Mills , one of the objections which has been raised regarding the passage of S.950 is that agencies would not use administrative law judges if they were an independent corps. Do you have any suggestions or observations to make concerning this allegation?

2. I agree with you that due process has traditionally brought the adversarial parties together where the judge or mediator can judge the demeanor and veracity of witnesses on the spot. Do you have any further information about how the telephone hearings are to be conducted? And do you know if any other agencies plan to follow Health Care Financing Administration's (HCFA) methods?

3. Given the high rate of reversals that HCFA has been suffering, how would you expect an independent administrative law judge corps to affect the interpretation and enforcement of existing rules and regulations by HCFA?

RESPONSES TO SENATOR HEFLIN'S QUESTIONS

AMERICAN FEDERATION OF HOME HEALTH AGENCIES, INC.
1320 Fenwick Lane ● Suite 500 ● Silver Spring, Md. 20910 ● (301) 588-1454

MARGIE MILLS
President
MICHAEL STEINHAUER
Vice-President
JOAN BUDDI
Secretary
DAMIAN DAMATO
Treasurer

August 25, 1987

Senator Howell Heflin
Chairman
Subcommittee on Courts and Administrative Practice
Committee on the Judiciary
Hart Senate Office Building 223
Washington DC 20510

Dear Senator Heflin,

Please allow me the opportunity of responding to the questions you posed in your letter of August 17th to Margie Mills, President of the American Federation of Home Health Agencies in association with the testimony she provided at the Administrative Law Judges Corps hearing. Ms. Mills is presently out of the country and the association has forwarded me your letter so that we may answer your supplemental questions before your August 31st deadline.

This national trade association actively supports passage of S 950, "The Administrative Law Judge Corps Act." The fundamental reason for our position is simply that judicial functions in Federal programs (and in any other area as well) must be kept free from undue political pressure stemming from any group or regulatory agency. The HCFA proposal directly compromises the integrity of the appeals process and encourages strong charges of conflict of interest and the denial of due process.

In response to your posed questions, let me address them item by item:

1) You have indicated that passage of S 950 might discourage home health agencies to participate in the appeals process. WE CANNOT DISAGREE WITH THIS ASSESSMENT TOO STRONGLY. Given the opportunity for an agency to exercise its appeals rights, in an environment where impartiality is assured,no agency or service we are aware of would hesitate to participate. There is simply no rational or logical reason why an agency, certain of its position and confident of its documentation skills, would not be motivated to bring its case before an independent body of administrative law judges. We would welcome to respond to the reasoning why someone would object to S 950 based upon the view that agencies would not utilize the ALJ corps. This objection is a complete falsehood.

2. We have little further information about how the telephone hearings are to be conducted. Further, we are not aware of any other agencies planning to follow the HCFA methods of conducting hearings in this manner. We remain however convinced that the telephone hearing process is, in itself, a denial of due process. We know of no other Federal, State or Local judicial review process by which parties involved do not have an opportunity to meet one another with a judge or mediator and present evidence in person. ALJ's and all levels of judicial oversight must have the opportunity to weigh the demeanor and veracity of witnesses and request, on the spot if necessary, additional items from the medical record.

   The precedent of this HCFA proposal, if accepted would be most ill-advised. The idea of additional federal regulatory agencies establishing their own judicial process is, in no less terms, undemocratic.

3. We would expect that an independent administrative law judge corps would impact on the interpretation and enforcement of existing rules and regulations by HCFA in a most equitable manner. Presently, the ALJ's adjudicating Medicare cases ARE independent; the S 950 proposal would assure this independence by placing well qualified, lawyers who have the facility to interpret a broad spectrum of legal matters before them. The analogue here is with that of Federal District Court judges, who hear cases from the FAA, FCC, Dept of Commerce and many other agencies. The S 950 independent ALJs would serve as similar function as it relates to the adjudication of the Medicare benefit-impartiality with broad knowledge.

   The matter of the high rate of reversals that HCFA has been "suffering" is simple to understand: the intermediaries and carriers are denying claims that clearly fall within the parameters of covered care, and once the case is reviewed, the ALJ is bound to side with the provider.

Again, thank you for the opportunity of providing further input into the discussion of this bill. As per your invitation we look forward to a review of the transcript prior to final printing and may include additional information and materials at that time for the hearing record.

Please do not hesitate to call or write for further assistance.

Respectfully,

Michael J Steinhauer, OTR, MPH

Michael J. Steinhauer, OTR, MPH
Vice President
American Federation of Home Health Agencies

cc: Margie Mills, President
Ann Howard, Executive Director
files
ms/ MJS

APPENDIX

ADDITIONAL SUBMISSIONS FOR THE RECORD

NATIONAL SENIOR CITIZENS LAW CENTER
1052 West 6th Street
Suite 700
Los Angeles, CA 90017
Telephone: (213) 482-3550

July 15, 1987

BURTON D. FRETZ
EXECUTIVE DIRECTOR

NEAL S. DUDOVITZ
DEPUTY DIRECTOR

Members, Sub-Committee on Administrative Law
House Judiciary Committee
B 351 A Rayburn House Office Bldg.-1
Washington, DC 20515

Re: Medicare ALJ corps and Appeals Board Plan

Dear Committee Members:

A radical reorganization plan that would put all administrative law judges who decide Medicare cases under the direct control of the Health Care Financing Administration is scheduled to begin operations on October 1, 1987. Enclosed with this letter are Department of Health and Human Services documents describing the plan. Beneficiary advocates believe that this Medicare ALJ corps plan seriously threatens the independence and integrity of the Medicare administrative appeals process.

The Medicare ALJ corps reorganization plan has the following salient features:

1. A new Bureau of Medicare Hearings and Appeals will be established under the Associate Administrator for Operations in the HCFA.

2. 30 new ALJs will be initially hired, not at the usual GS-15/16 rank held by other ALJs but at GS-14 status.

3. There will be a single, national hearing office at which all the new ALJs will work, holding most hearings by telephone rather than in person.

4. The initial hearings will be on Part B claims, but by April, 1988 HCFA plans to transfer all Part A hearings and provider sanction cases to the new Medicare ALJ corps as well.

5. The HCFA Bureau of Medicare Hearings will take over from the Social Security Appeals Council the function of deciding appeals from its ALJs' decisions, establishing a new Medicare Appeal Board for that purpose.

We are extremely concerned about the effect of this Medicare hearings and appeals reorganization plan on the elderly Medicare claimants whom we represent. The pressure on the special ALJs to follow agency policy rather than their independent judgment will be irresistible. Both their physical location within the national headquarters of the agency, and the desire for promotion consequent on their low GS rating, impose insurmountable barriers to the impartiality prized in the administrative law judge system.

We are also alarmed by the plan to provide telephonic, rather than face-to-face hearings for Medicare claimants. Communication experts have established that face-to-face discussions are far more successful than telephonic conversations, particularly for the elderly. It is also unlikely that these telephone hearings would survive a judicial challenge based on due process grounds.

The proposed Medicare Appeals Board also raises grave questions about the fundamental fairness of the proposal. Who will its members be, what are their qualifications, and how will they be chosen and retained? Their inherent bias toward the agency for whom they work will be exacerbated by their physical and organizational proximity to the Medicare ALJs whose decisions they will review.

In section 9341 of OBRA, 1986, Congress improved the Medicare Part B appeal system by providing that Part B claimants with more than $500 in controversy would receive hearings before administrative law judges. (Formerly, all part B hearings were held by carrier-hired hearing officers, which suggested a lack of impartiality that was objectionable.) By establishing this Medicare ALJ corps and Appeals Board, the HCFA will frustrate the intentions of Congress in last year's reform legislation and extend the taint of bias to the Part A appeals system as well.

Finally, we are concerned that the HCFA should be able to reorganize the Medicare appeal system in this way, with no congressional authorization or other public notice and input. In an area in which the balance between agency power and individual rights is so delicate, the HCFA should not be free to restructure the appeal system behind closed doors.

Thank you for your consideration of this matter.

Yours very truly,

Sally Hart Wilson
SALLY HART WILSON
Staff Attorney

SHW:sb
Enc.

DEPARTMENT OF HEALTH & HUMAN SERVICES
Social Security Administration

Refer to: SGJ2

Office of Hearings and Appeals
PO Box 3200
Arlington VA 22203

MAY 26 1987

MEMORANDUM TO: Regional Chief Administrative Law Judges
Hearing Office Chief Administrative Law Judges
Hearing Office Managers

FROM : Acting Chief Administrative Law Judge

SUBJECT : Processing Requests for Hearing in Medicare Part B Cases

As you may know, the Management Council of the Department of Health and Human Services has determined that the Health Care Financing Administration (HCFA) will establish its own Medicare hearings and appeals process to handle all Medicare adjudication. Although the precise steps to implement this decision have yet to be finalized, we have been advised that HCFA will immediately assume responsibility for providing hearings in Medicare Part B cases where the issue is not initial entitlement to Supplementary Medical Insurance Benefits (SMIB). Where the only issue is entitlement, OHA will continue to process the request for hearing.

If a Part B request for hearing is received in the HO, it must first be reviewed to determine that the issue is not entitlement to SMIB. If the issue is not an entitlement, the request for hearing should immediately be transferred the appropriate HCFA Regional Office (RO). The request and any other documentation should be sent to the attention of the Chief, Beneficiary Services Branch. Attached you will find a list showing the name, address and telephone number of the individual to whom the requests should be forwarded.

At this time only requests for hearings in Part B cases should be referred to the HCFA RO. If you are not sure whether a request for hearing relates to a Part B or Part A claim, the HO manager should contact the Chief, Beneficiary Services Branch of the appropriate HCFA RO.

For your information, most Part B hearing requests can be identified by careful review of the Explanation of Medicare Benefits (EOMB) form if one is submitted with the request for hearing. The form will indicate the type of services covered and the amounts billed. The specific services covered will usually involve physicians, laboratory, physical therapy, ambulance service or durable medical equipment. The EOMB will also indicate that a $75 yearly deductable applies and that payment for covered services may not exceed 80% of actual cost.

Another way to identify a Part B case is by reviewing a prior decision, if one is submitted with the request for hearing. Where Part B benefits are denied, the claimant has the right to a contractor hearing, and following that an ALJ hearing, if at least $500 remains in controversy. The decision issued by the contractor hearing officer will contain language informing the claimant that they may request an ALJ hearing. The presence of a contractor hearing decision will establish that the request for hearing relates to a Part B case; however, the absence of a contractor hearing decision should not be interpreted as establishing that the request is a Part A hearing. Careful review of these cases is essential to proper routing.

If a Part A case, or a Part B case where the only issue is entitlement to SMIB, is mistakenly forwarded to the HCFA RO, it will be returned to the HO for processing. If you have any questions, please contact your Regional Office.

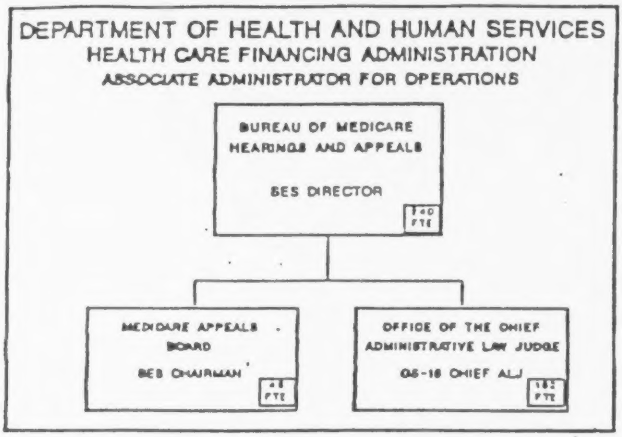
James R. Rucker, Jr.
for

Attachment

cc: Associate Administrator for Operations, HCFA
Regional Administrators, HCFA
Chiefs, Beneficiary Services Branch
HCFA, Regional Offices

BUREAU OF MEDICARE HEARINGS AND APPEALS

On April 22, the Management Council approved a proposal to place responsibility for Medicare hearings and appeals in the Health Care Financing Administration. Attachment A is the approved HCFA Hearings and Appeals Implementation Proposal. The purpose of this agenda item is to obtain advice and consultation from the Management Council before development of a formal reorganization proposal. The following chart shows HCFA's proposed bureau and office level structure.


DEPARTMENT OF HEALTH AND HUMAN SERVICES
HEALTH CARE FINANCING ADMINISTRATION
ASSOCIATE ADMINISTRATOR FOR OPERATIONS
BUREAU OF MEDICARE HEARINGS AND APPEALS
SES DIRECTOR
240 FTE
MEDICARE APPEALS BOARD
SES CHAIRMAN
48 FTE
OFFICE OF THE CHIEF ADMINISTRATIVE LAW JUDGE
GS-18 CHIEF ALJ
FTE

ESTIMATE OF HCFA HEARINGS AND APPEALS FTE REQUIREMENTS

The Social Security Administration has agreed to transfer 155 FTEs in FY88 to HCFA to perform the Part A and the provider termination and sanction hearings and appeals functions for which SSA has previously had responsibility. Attachment B is HCFA's proposed recruitment plan for the hearings and appeals function. The proposed recruitment plan projects 240 employees on duty as of April 1, 1988. However, because of the phased-in hiring HCFA projects an expenditure of only 196 FTE's in FY88.

SENIOR LEVEL POSITIONS REQUIRING DEPARTMENTAL APPROVAL

The proposed structure projects the need for two Senior Executive Service (SES) level positions, the Bureau Director and the Chairman of the Medicare Appeals Board. Each of these positions should be career SES slots. The Bureau Director is responsible for HCFA's entire hearings and appeals function and all other bureau level positions are classified as SES. The Chairman of the Medicare Appeals Board will have final responsibility for managing the appeals organization that issues final administrative decisions for the Secretary in all Medicare related cases. The Chief Administrative Law Judge will supervise and direct the work of subordinate GS-14 and GS-15 Administrative Law Judges.

HCFA Hearings and Appeals Implementation Proposal

HCFA will start holding Part B hearings as soon as possible after October 1, 1987.

- Part B hearing requests received before 10/1/87 will be held in pending status. We estimate that by 10/1/87 there will be about 3,000 cases ready for ALJs to hear, with the oldest cases about 120 days old.
- HCFA's Part B hearing process will require approximately 30 GS-14 ALJs recruited from OPM's GS-15/16 ALJ register. They will receive a 3 to 4 week in-house training program. About 75 support staff will also be required.
- HCFA will operate a single hearing office, utilizing a telephone hearing process to the maximum extent possible. It is expected that 75 percent of the hearings will be conducted by phone.

HCFA will assume the Part A workload from SSA as soon as possible after the Part B process is up and running. Our target date would be 4/1/88.

- The Part A benefit cases will be included in the process established for Part B. Twelve additional ALJs, with 30 support staff, will be required.
- The provider termination and sanction cases, which are adversarial, will be handled by 6 GS-15 ALJs, plus 21 support staff.

HCFA will establish an appeals board to handle beneficiary, provider and agency appeals of ALJ decisions in all Medicare cases. This board would be in place in time to handle the first Part B appeals (approximately 1/1/88). HCFA will also assume responsibility from SSA for the Part A appeals workload. This activity will require approximately 40 people.

Estimate of HCFA Hearings and Appeals Staffing Requirements

(Staff numbers are cumulative by quarter based on a phased-in assumption of hearing requirements)

	7/1/87	10/1/87	1/1/88	4/1/88
Benefit Hearings - Part B Workload				
ALJs (GS-14):		30	30	30
Support Staff:		75	75	75
*Benefit Hearings - Part A Workload				
ALJs (GS-14):				12
Support Staff:				30
Provider Termination & Sanction				
ALJs (GS-15):				6
Support Staff:				21
Medicare Appeals Board				
Members:	1	2	4	4
Support Staff:	3	8	36	36
Management & Administration	10	20	26	26
TOTALS:	14	135	171	240

*Possibly earlier, if need to work down Part B backlog.

... home health line

the home care market's national independent newsletter 301/586-0100

JUNE 22, 1987 <> VOLUME XII

Page 230 NAMES HEAD CHALLENGES DEALERS ON DME QUALITY-ASSURANCE NEED AND STRATEGY
Page 231 BUT AARP FAVORS "GOVERNMENT SURVEY AND REGULATIONS" OVER "EFFECTIVELY UNENFORCEABLE" JCAH STANDARDS
Page 232 BILL CABIN ON GETTING MEDICARE HH PRIORITIES STRAIGHT
Page 235 ***. . . the competition:*** *Beverly HomeHealth Services* Survey; Hank Margiotta; Gary Carpenter; Sandy Linden
Back Page 1986 READER-FRIENDLY INDEX SOON AVAILABLE

...top level

Senior ALJ Hits HCFA Takeover

ADMINISTRATIVE LAW JUDGES (ALJ) are dismayed by the Health Care Financing Administration's (HCFA) plans to take over responsibility for Part A and Part B hearings before ALJs from the Social Security Administration (SSA, see ...hhl 6/1/87), a senior ALJ regional official told ...hhl last Friday.

"We reverse 90 percent" on a national basis, of **intermediary determinations on home health claims** that are appealed to the ALJ level, the ALJ said, contending that **HCFA's move is an attempt to subvert the ALJs' autonomy.**

Durable medical equipment (DME) suppliers should note that in a broad-based effort to mitigate HCFA's administrative control over the appeals-decision process, the "Medicare Appeals Coalition" taskforce (see ...hhl 5/11/87 and 6/17/85) will soon release a comprehensive draft model regulation for implementing the hard-won Part B appeals reforms adopted in the Omnibus Budget Reconciliation Act of 1986 (OBRA, see ...hhl 10/20/86), task force chairman Frank Case (202/223-6611) told ...hhl earlier this month.

"It's very hush-hush right now," the ALJ told ...hhl, but HCFA's plans for establishing its own ALJ system include hiring "35 to 50 judges and housing them in Baltimore," where they could be monitored more easily than if they were in the regions; **holding some hearings by telephone;** and allowing "lower-level lawyers" from HCFA to conduct some hearings, with the lawyers "promoted" to full ALJ status **if their decisions satisfy HCFA.**

The current ALJ system, meanwhile, "is in deep trouble," the ALJ charged.

According to the ALJ, the "national backlog" of cases pending before Social Security Administration ALJs **has topped 150,000**

...top level continued on back page

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THE HOME MEDICAL EQUIPMENT INDUSTRY MUST IDENTIFY QUALITY ASSURANCE as a crucial focus of its long-range survival strategy, National Association of Medical Equipment Suppliers (NAMES) president Tom Antone told an audience June 2 during the 1987 NAMES annual convention in Dallas that drew 1700 durable medical equipment (DME) suppliers, manufacturers and other participants. Ranking right after "to survive as an organization" and "to pass the industry 'Six-point Plan,' " said Antone, NAMES' third strategic priority is to "deal with the quality-assurance problem."

"You may be sitting out there right now saying 'What quality assurance problem?' " Antone remarked. He proceeded to tell them.

"Home care is a very broad generic term" and the complex of providers and suppliers that includes home health agencies, DME companies and a variety of personal care and chore service agencies, "is probably the **least regulated, least observed and least overseen of any health care or quasi-health care industry in America."**

"As a result, problems are emerging."

"The American Bar Association, which carries a great deal of clout in Washington, has put out an extremely influential report that received a great deal of attention on the Hill called 'The Black Box of Home Care [Quality,' see ...hhl 7/21/86 and 8/11/86], and it's quite candid in its conclusion that **the Federal government has been lax almost to the point of negligence in any kind of regulation to assure that the care provided to people in their homes meets any kind of minimal standards that would offer assurance that people aren't going to be neglected, ripped off or otherwise abused.** Secondly, the House Aging Committee and the Senate Aging Committee are both extensively involved right now in investigating quality of care types of issues. In fact, there's been a bill introduced on the House side. Thirdly, national TV about four weeks ago ran a dramatic expose, which perhaps many of you saw, on abuses in home care [see ...hhl 4/27/87 and 3/9/87]. When you put all these things together, you take into account the fact that the Federal government doesn't regulate DME at all and probably 90 percent of the state governments don't regulate DME at all, and you've got the following scenario:"

"Either we acknowledge the fact that the public will expect of us, and as professionals we have an obligation to give them, some assurances that the quality of care we give them meets some acceptable standards, or we'll have it forced on us in ways in which we do not have a chance to participate."

Now is the time for the industry to act, Antone warned. "For a change, **what the [NAMES] board of directors and staff are trying to do is get ahead of the power curve and be anticipative and direct a problem,** rather than do what historically we've done, which is to wait until the problem is upon us and then drag our feet trying to decide how to respond to it. Those are harsh words for this industry," Antone acknowledged, "but that's what we've done. And I speak [from experience], not just since I joined the industry, but for the many years I observed the industry when I was with the Department [of Health and Human Services]. **This is one industry that wanted no change, no negotiation, no talk, just fight, fight, fight.** And that's a losing strategy, particularly a losing strategy for quality assurance issues."

The winning strategy involves **taking a lead on setting standards of quality within the industry,** Antone advised, a strategy NAMES is currently pursuing through participation on the Joint Commission on Accreditation of Hospitals (JCAH) advisory committee for home care accreditation. The JCAH issued a second draft of its emerging home care accreditation standards in April, including standards for DME and home infusion therapy suppliers and personal care and support services providers in addition to home health agencies (see ...hhl 4/27/87). NAMES was invited to join the advisory body last August (see ...hhl 8/4/86) without the whole-hearted enthusiasm of some participants. "In fact," Antone told his audience, "there were a number of individuals with whom I sit on the JCAH advisory board, and with whom I had a series of fairly heated debates, who did not want DME companies to have accreditation available to them. **If you don't have accreditation available to you and other agencies do, you could stand to lose your lunch."**

Antone emphasized that the JCAH accreditation, when it becomes available, "for the average DME dealer, even one involved in a joint venture with a hospital, will be **utterly voluntary.** It's your choice. You don't have to do it. But I do urge you to begin to work with the JCAH now so that when the time comes for you to make that choice, you'll be making an informed choice."

AS ANTONE URGED HIS MEMBERS TO WORK WITH THE JOINT COMMISSION ON Accreditation of Hospitals (JCAH), in developing its home care accreditation process, the over **25-million member American Association of Retired Persons** (AARP) examined JCAH's efforts to date (see ...hhl 4/20/87, 11/3/86, 8/4/86 and 7/14/86) and **found them wanting.** Excerpts from a June 9, 1987 letter to JCAH Home Care Advisory Committee chairwoman Kathy Dodd, from AARP immediate past president Vita Ostrander, AARP's organizational representative to the JCAH Home Care Advisory Committee:

"Although AARP encourages efforts to regulate the home care industry, and appreciates the JCAH's activities in this regard, it is important to understand that at this time AARP does not endorse any organization's standards. Rather, **we are committed to advocating on behalf of consumers.** Further, AARP believes that the proposed standards as currently drafted **fail to address a number of issues** critical to an acceptable quality assurance scheme."

"To ensure that consumers receive the highest quality home care, AARP believes that regulations must be mandatory, not voluntary."

"The proposed standards lack **sufficient detail** so as to make them far too broad. This makes them **effectively unenforceable."**

"Monitoring and evaluation activities relating to quality assurance must be rigorous and on-going. Typically, existing quality assurance mechanisms emphasize compliance with organizational and procedural standards. The proposed standards do not offer improvement in this area."

"Minimum requirements for the training and supervision of personal care/support personnel must be specifically enumerated. References to applicable laws and regulations are inadequate as there are currently no Federal laws or standards in this area, and the vast majority of states lack laws or regulations relating to training requirements."

"The surveyor guidelines should include a section on evaluation of personal services. This is a **glaring deficit."**

"We continue to seek **more stringent regulation through legislation** and would not accept accreditation and voluntary standards as a **substitute** for government survey and regulations." (Emphasis supplied throughout.) ▲

IS "INTERMITTENT CARE" REFORM THE TOP HOME HEALTH PRIORITY FOR 1987?

by William D. Cabin (201/256-3407)

"The times they are a changin'."

So goes the title to a folk song popular twenty years ago! If only those words were heeded today by the home health industry and Congress, we might avoid what appears to be an evolving crisis of rising and unfulfilled expectations. I am speaking of the major home health issue that Congress appears willing to address this session — "intermittent care."

The catastrophic-illness legislation (**see provisions in the catastrophic-care legislation: ...hhl 6/8/87, 5/11/87, 4/20/87 and 3/16/87**) heading through Congress could liberalize the definition of "intermittent care." The expectation is that if some liberalization is enacted, it will benefit home health agencies (hha) and beneficiaries by increasing home-health-visit volume, and the number and type of patients served. However, I do not think such a result is a reasonable expectation given the nature of the Medicare home health medical review and coverage system. Let's look at the history and current reality of that system and where a liberalized "intermittent care" definition might have an impact.

Back in 1983 and 1984 "intermittent care" and "homebound" were all the rage as provider issues. Fiscal intermediaries (FI) were using restrictive interpretations of these coverage criteria as the primary basis for claim denials; hha's were screaming about the unjust denials; and the national trade associations were legitimately responding to their constituencies by making redefinition of the "intermittent care" and "homebound" requirements their top legislative and regulatory priorities.

The Health Care Financing Administration (HCFA) further aggravated hha's by calling such denials "technical denials," saying they were appealable only by beneficiaries, not hha's. Then, in 1984 HCFA changed Section 257-A of Health Insurance Manual-11 to prohibit hha employees from being designated as beneficiary representatives to appeal such "technical denials."

In response to the outrage of home health providers, Congressman Henry Waxman and Senators John Heinz and Lloyd Bentsen introduced legislation in 1984 (H.R. 3616 in the House, S. 2338 in the Senate) to liberalize and clarify the "intermittent care" definition, and the National Association for Home Care (NAHC) filed a lawsuit challenging HCFA's revision of Section 257-A.

What happened? The "intermittent care" legislation of 1984 was not passed. The NAHC lawsuit was successful, but not until the summer of 1986 and, was followed by a parallel statutory change which took effect October 21, 1986 — nearly three years after the injustice.

It's now 1987. Things have changed. We are in a new era and have been for at least two years. Failure to meet "intermittent care" or "homebound" requirements is no longer the primary basis for denials. We now have mandated use of UB-82s, the Forms 485-488 system, national coverage screens (being used by at least three FIs), postpayment reviews, intensified pre- and post-payment medical review, waiver of liability on the way out, Peer Review Organizations (PRO) on their way in, and a system of ten regional FI's for freestanding hha's with a similar system proposed for hospital-based hha's.

In the new era, denials are not based primarily on "intermittent care" or "homebound" criteria. That stage is over, but many hha's were so chilled by the experience that **they reduced patient admissions, decreased visit volume, and sped up discharges to avoid such denials.**

Nowadays denials are based primarily on lack of medical necessity or reasonableness, failure to meet the "skilled care" requirement, findings of custodial care, and inadequate documentation or completion of forms in the UB-82/485 system. According to HCFA data, in the last quarter of Fiscal Year (FY) 1986, 69 percent of all denials nationally were for "medical" reasons, and the overall denial rate was at a record 7.5 percent of all claims processed. In 1984, at the height of the "intermittent care" crisis, NAHC and others reported the national denial rate was only around 1.5 to 2 percent. **The bottom line:** the overall rate of claim denials has increased sharply and the percentage of all denials based on failure to meet "intermittent care" or "homebound" requirements has decreased sharply.

This does not mean that the "intermittent care" and "homebound" issues are irrelevant. It does not mean that agencies in certain states are not having problems with these issues. But it raises questions about priorities and about the appropriateness of proposed solutions. Even in Colorado, which reported a major "homebound" problem recently, an August 1986 Colorado Association of Home Health Agencies survey covering all of 1985 and more than two quarters in 1986 found hha's saying they felt that only 1.7 percent of all denials were "denied in error" by the FI. According to the survey, 51 percent of all denials were based on "not reasonable and necessary," and a total of 87 percent were denied as "not reasonable and necessary," "not skilled," or "custodial or maintenance" care. "Non-intermittent" denials constituted only 2.4 percent of all denials (19 of 791) which hha's felt were "denied in error."

"Intermittent care" and "homebound" denials are **not** the reason that, as reported by the Illinois Council of Home Health Services, 44 percent of all Illinois hha's said they were off waiver for one or two quarters in 1986. And they are **not** the reason that hha's in Massachusetts, Louisiana, Florida, Oklahoma and other states have gone off waiver in record numbers since 1985. "Intermittent care" and "homebound" technical denials have not counted against waiver status. **It's all those other reasons classified as "medical," and the new "technical" errors created by the UB-82 and Forms 485-488 that are causing the problems.**

Yet, with all this evidence of changing times, Congress and the national trade associations are fixating on "intermittent care." Not only are there three pending pieces of legislation, but "intermittent care" is highlighted as one of NAHC's six key 1987 legislative issues and is the centerpiece of the recent lawsuit filed by the Center for Health Care Law (see ...hhl 6/15/87, 2/23/87 and 2/16/87). **While some members of Congress and the trade associations may have the best of intentions, their legislative proposals, if passed, will do little to help the average hha.** Their attempt to address the failings of the current system by legislation aimed at the injustices of the old system can only result in false expectations, a negligible impact on the medical review system, and legislative mandates where intent can and will be easily subverted by HCFA and its FIs.

In the best of all possible scenarios, the pending legislation would result in broadened parameters defining "intermittent care" with three potential positive results:

- Denials based on ineligibility because a beneficiary is not in need of "intermittent care" might decrease;

- Denials because a beneficiary is receiving additional care supplemental to Medicare "intermittent care" (i.e., the so-called "coordination of benefits") might decrease; and

- Denials because the frequency of visits exceeds permissible "intermittent care" limits might decrease if the FI felt the visits were justified in terms of the medical necessity and skilled care requirement.

That's the best possible scenario. But even that is unlikely to have significant impact for several reasons. First, there aren't currently that many denials based on failure to meet the "intermittent care" requirements. Second, HCFA and the FIs can void any potential expansion of coverage by using other bases for denial (as they have been doing) such as lack of medical necessity, lack of requisite skilled care, a finding of custodial or maintenance care, or UB-82/485 technical errors. Third, denial of physical, speech and occupational therapy visits and social service visits is not based on "intermittent care" criteria, so agencies would not benefit from a liberalized definition in these cases. Fourth, the proposed definition merely sets permissible outside boundaries within which care may be covered, subject to the **FI's discretion,** and soon, the **PRO's review.** Unless CPEP (HCFA's Contractor Performance Evaluation Program) evaluation criteria are changed, FIs are unlikely to have an incentive to be liberal in applying any new "intermittent care" parameters. Fifth, given that most of the legislative proposals would require a "monthly" certification of need, the FI would be given an opportunity to increase its frequency of review and, therefore, its opportunities to issue denials whether for "non-intermittent" or other reasons. This provision also could easily result in HCFA requiring another Form 485 or 486 submission, an increase in paperwork and cost to hha's which does not appear to have been considered by proponents of the legislation.

The point here is that "intermittent care" is the wrong issue. The real issue is the claim denial and appeal, and the medical review system. **Until a significant dent is put in HCFA's and the FIs' unbridled discretion to deny coverage virtually ad infinitum, little progress will be made.** This means getting reforms such as (1) mandatory and reasonable turnaround time on reconsideration appeals (a provision of the Bradley-Waxman Medicare Home Health Services Improvement Act of 1987, see ...hhl 5/4/87 and 3/30/87); (2) making timeliness on rendering reconsideration decisions a factor with significant weight in FIs' CPEP reviews; (3) immediate budget allocations to FIs to reduce current reconsideration backlogs and (4) ongoing allocations to avoid future backlogs; (5) getting the ability to appeal claims "denied but paid under waiver"; (6) restricting FIs' ability to issue "retroactive" denials for up to a year after the initial determination for virtually any reason; (7) requiring minimum professional qualifications for medical review personnel at least equivalent to the Medicare requirements for Registered Nurses in hha's; (7) elimination of HCFA's use of sampling as a basis for projecting overpayments and demanding recoupment; (8) a very detailed specificity requirement for claim denial notices; and (9) the right to receive direct reimbursement for at least a percentage of appeal, PRO, and Form 485-related costs, without having those costs affect the hha's per-visit cost and LCC (lower of cost or charges) calculation.

That's a formidable agenda, but at least it's one with issues that have **a higher probability of yielding positive bottom-line results and a lower probability of subversion by the regulators.** ▲

the competition

"HOME CARE MUST BECOME A HOUSEHOLD WORD BEFORE CONSUMERS WILL ask about its availability" *Beverly HomeHealth Services* director of marketing and communications Steve Scheidt told a Frost & Sullivan seminar, "Opportunities in the High Technology Sector," held June 8 and 9 in New York City. Home care isn't a household word yet, according to recent market research on behalf of *Beverly*. Asked "which of the following health services do you know something about?", **only 39 percent of the respondents checked "Home Health Care"** and **only 32 percent checked "Hospice Services"** in a survey targeted at San Francisco, Los Angeles, and San Diego **metropolitan-area households with combined incomes over $40,000**. After the initial identification question, the survey went on to define home health care as "a service that provides nurses, nurses aides, physical therapists, social workers, equipment and equipment specialists and pharmacists for inhome health care." Respondents were then asked, "Have you ever heard of home health care before now?" and 72 percent replied "yes". (The recognition questions are part of a wider study commissioned by *Beverly* which, according to the chain, also contains proprietary information that will not be released.) Among other survey results *Beverly* supplied to ...hhl: **72 percent** of the survey respondents agreed that, based on *Beverly's* definition and their own knowledge, home health care "does seem like an alternative you would consider next time you or a family member needed medical care." **Asked "Where did you hear about home health care?", 36 percent of the respondents selected family**; 27 percent, newspaper/media; 26 percent, friends; 18 percent, doctor; 12 percent, nurse, and 6 percent said they work in the industry. **Asked "If you wanted to learn more about home health care, where would you start looking?" 66 percent**

of all respondents chose private physician; 34 percent, friends/family; 32 percent, hospital; 18 percent, insurance company; 13 percent, the Yellow Pages, and 3 percent, social services. Asked to rank, in order, services that "would be most useful to you if you were to become disabled," 69 percent of the respondents ranked meal preparation as useful; 67 percent, transportation; 60 percent, housekeeping; 48 percent, adult day care; and 30 percent, companion care. According to *Beverly*, the typical survey respondent was a 50-year-old, college-educated male with medical insurance with a household income of approximately $50,000. The written survey was sent to 5,000 households; 23 percent responded. At the Frost & Sullivan conference, Scheidt said *Beverly* has **107 durable medical equipment (DME) locations, 12 Medicare-certified home health agencies, 17 home health service centers** (private pay), and 27 pharmacy units serving its home care operations.▲

HOME-HEALTH-COMPUTER PRO HANK MARGIOTTA (408/298-2313, SEE ...hhl 11/18/85) has joined *DATACRON Inc.*, Elmhurst, IL, as western region marketing manager and has opened a *DATACRON* office in San Jose, CA. *DATACRON*, which also has regional offices in Houston, TX, and Omaha, NE, supplies computer hardware and software for in-house home health agency computer systems. Its software modules include accounts receivable, nursing documentation, general ledger, private-duty accounting, accounts payable, scheduling, and durable medical equipment (DME). "We're starting to spread quite rapidly," partially through acquisitions of regional computer-related businesses, Margiotta told ...hhl. In the past year, according to Margiotta, *DATACRON* has purchased *Fleet Information Systems*, a Providence, RI-based data-processing service bureau; a home health software developer, *CareData*, Indianapolis, IN; and *Pierson, Miller, Young*, Joliet, IL, a producer of "turn-key" computer packages for home health agencies. Margiotta said *DATACRON* counts more than 100 home health agencies in 24 states as customers.▲

"WE ARE GOING GROWTH," REPORTS QUALITY CARE'S GARY CARPENTER, recently promoted from senior director of Medicare to vice president/controller for the Rockville Centre, NY-based proprietary chain (see ...hhl 10/6/86 and 3/31/86). According to Carpenter, *Quality Care* now operates 35 Medicare-certified agencies and 142 private pay locations. *Quality Care's* most recent acquisition is American Home Care, Omaha. *Quality Care* has fared well in the recent New York State Certificate of Need (CON) wars (see ...hhl 10/6/86 and 9/9/85), winning CONs for eight New York counties, with two other applications pending, Carpenter said, "out of 75 potential slots" available. *Quality Care* 1986 revenues were about $160 million, according to Carpenter.▲

SANDY LINDEN IS DOWN BUT NOT OUT. HIS YEAR-LONG STRUGGLE TO salvage his financially stricken Southfield, Michigan durable medical equipment (DME) company, *Linden Medical Supply, Inc.*, ended with what he described as a **surprise bank takeover on April 24**. Linden declined to detail the financial woes that he said began to surface in May of 1986 (at the conclusion of his tenure as chairman of NAMES), because "it's really going to get hung up this summer in litigation." Linden attended the NAMES annual meeting in Dallas **"for three days specifically to talk and to face people,"** he said, and vendors "were, for the most part, quite compassionate and understood my plight. I haven't had any bad words with any vendor, and I don't anticipate any." After the dust settles, Linden expects to be involved in home care as a consultant. "The bottom line is I've got to start all over, but I'm certainly willing to do it and even looking forward to getting some new challenges. **I'm looking at some interesting projects that could really help the hospital community and some of the big majors to bring home health care on line**. That's probably the direction I'll be going in."▲

...top level continued

and is rising at a rate of some 5,000 cases per month. In other words, the ALJ said, "a person filing a claim today probably wouldn't get a hearing until 8 or 9 months from now." Meanwhile, low morale among the SSA's Judges has aided other agencies in "raiding some of our best people," while at the national level, "**anybody with any expertise is being removed**" by the Reagan Administration. Further, "we're short of regional chiefs" as vacancies go unfilled. In short, said the ALJ, "the problem is just compounding itself."

"The word is," the ALJ told ...hhl, that the Reagan Administration plans "to let this thing get out of control, then they can say 'the system is getting out of control' " and move to HCFA-based ALJs. Added the ALJ, "**they really don't care what the [appeals] procedure is, as long as they can control it.**"

The ALJ contended HCFA is "trying to be sure" that the 90 percent reversal rate at the ALJ level for Part A home health claims determinations "**doesn't carry over to Part B.**" But, the ALJ argued, "it's not that we're that liberal." When ALJ decisions are appealed to the District Court level, the ALJ said, "**the District Courts think we're too conservative.**"

"Suppose a corporation's inspectors" found defects "in 90 percent of the products coming off their assembly line." The ALJ argued that "most prudent people would look at the assembly line" for the cause of the problem and correct it. The Reagan Administration, the ALJ said, "**wants to fire the inspectors. It's Kafkaesque.**"

The ALJ noted that HCFA Associate Administrator for Operations Louis B. Hays, while at the Social Security Administration, set as a goal "reducing the number of people receiving the Social Security disability benefit. For political reasons," concludes the ALJ, "people pay no attention to the law. This is very unfair to those who care for the sick, elderly and disabled," who are "unable to fend for themselves" within the appeals system. To insure "fairness," the ALJ said, "**the Judges feel we just have to exercise our independent authority free from agency pressures.**"▲

The **24-page** 1986 ...home health line **READER-FRIENDLY INDEX** covering over 350 articles is now ready for printing and distribution. Each **basic** subscriber is entitled to **one** copy free of charge (that is, **ONE INDEX PER ...hhl LABEL**), provided you send your label to ...home health line in an envelope marked "1986 Index" in time to reach us **by Thursday, June 30.** Others **(including those whose envelopes do not reach us before July 1)** may purchase this abbreviated "1986 Home Care Yearbook" for **$10** prepaid. △

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FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D. C. 20426

July 21, 1987

Honorable Howell T. Heflin
Chairman, Subcommittee on Courts
and Administrative Practice
Congress of the United States
Washington, D. C. 20510

Dear Chairman Heflin:

I wish to advise you and the members of the Subcommittee on Courts and Administrative Practice of the Federal Energy Regulatory Commission's (FERC) continuing concerns with the concept of a unified corps of administrative law judges and specifically with the provisions of S.950, the "Administrative Law Judge Corps Act".

S.950 would create a unified corps of administrative law judges that will hear and render a decision upon every case subject to Section 554 of the Administrative Procedure Act and every case required by law to be held in accordance with Section 554 and Section 556 of the Administrative Procedure Act.

We at FERC have a number of concerns with the concept of a unified corps of administrative law judges. First, it may be helpful to review very briefly the function of the independent regulatory agency and the role played by the agency office of administrative law judges. The independent regulatory agency has been characterized by some as an arm of the Congress performing a delegated function that the Congress could choose to perform itself. In part, at least, that characterization is probably accurate.

In carrying out its duties, the independent regulatory agency has three reasonably distinct missions:

1. Legislative -- when it issues franchises or certificates of public convenience and necessity; when it prescribes rules and regulations; and when it prescribes rates.
2. Executive -- when it requires reporting by jurisdictional entities and enforces its rules and regulations.
3. Judicial -- when it adjudicates disputes among parties.

The offices of administrative law judges of the various independent regulatory agencies are the trial judiciary of the agencies operating analogously to the United States District Courts in non-jury cases. The administrative law judges perform a delegated function of the independent agency which the agency, that is its members, could choose to perform. In performing this delegated function the administrative law judges must apply the policies enunciated by the agency and the laws enacted by the Congress, as interpreted by the agency and the courts, to the facts of particular cases.

This is an extremely important process because a formal, open, on-the-record hearing followed by a well-reasoned and fair decision makes it far more likely than otherwise that the ultimate decision of the agency, as approved by its members, will also be well-reasoned and fair.

This agency cannot support S.950. First, most independent regulatory agencies, like the FERC, will be quite hesitant to delegate statutory functions to non-agency employees whose responsiveness they cannot control. Second, the same is true with respect to non-agency employees about whom the agency cannot feel assured there is a high degree of substantive experience in matters of the agency's jurisdiction. Both of these concerns have their basis in a single, fundamental premise: the agencies are clearly accountable, in one way or another, to each of the constitutional branches of government for the performance, or lack thereof, of their statutory responsibilities. The Congress supervises the agencies through substantive legislation, oversight and authorizations and appropriations; the judiciary through judicial review; and the executive through appointments and various kinds of substantive interventions.

Under the unified administrative law judge corps concept, an agency would have reason to fear a lack of responsiveness to its needs and priorities. It must be remembered that an administrative law judge's independence from the agency is solely decisional. Otherwise, he or she is bound by the agency's rules. Consequently, the agency sets the priorities in accomplishing its mission -- it can order one case to be heard before another, it can order immediate hearings, it can establish time limits, and the like. To reiterate, agencies would be understandably reluctant to assign cases, many of which are of national or international significance, for hearing before an official who is not accountable to the agency for the timeliness and manner in which he or she decides the agency's case, particularly since the agency will be held accountable for the conduct of such officials. This would be specifically true of the FERC where it is necessary on many occasions to order expedited hearings and decisions in order to meet national and international energy emergency situations. The agency would be inclined to lean more and more on deciding cases by written rulemaking or employee panels. In other words, if the hearing process is to remain a viable method of deciding and disposing of administrative or regulatory proceedings, the agency which is ultimately accountable to Congress in particular must perceive responsiveness on the part of decisional officials to whom decisional acts are delegated. Confidence in such officials is a function of ultimate accountability to the agency. The only accountability provisions of S.950 is section 589 providing for removal and discipline. Those provisions, however, are so remote from the agency and uncertain of outcome that the necessary accountability is absent from the bill.

Concerns about the responsiveness of administrative law judges under the bill are crucially important to FERC, but they are essentially procedural. At least as important is the related possibility that matters could be referred to administrative law judges who are substantively inexpert in their handling. In this connection, it is useful to take as a model the average administrative law judge. There are some administrative law judges of well above-average ability who would be able to handle complex, arcane and specialized matters of the FERC's jurisdiction, but I am confident that their number is few indeed. The bill recognizes this problem and attempts to deal with it in the limited specialization provisions of section 584. Problematically, it would bring together in the Division of Communication, Public Utility and Transportation Regulation the work of six major economic regulatory agencies. During the past few years, the FERC has appointed administrative law judges from four of those agencies. It has taken a great deal of time and training for the transferred judges to become proficient in our specialized areas of jurisdiction and an even longer time for those judges to really feel comfortable with their new areas of work. These examples serve to illustrate, I believe, that the work of the major economic regulatory agencies is not so similar as to permit easy movement from the subject matter of one to that of another. Aside from this very important fact, there is no guarantee that there will even remain such a division. Section 584(b) provides that "... the number of divisions and jurisdiction of each division shall be determined by the Council." After the first Council members (Division Chief Judges) are appointed by the President, their successors will be appointed by the Chief Judge with the approval of the Council. This means, in effect, that a specialized division will exist pretty much only in the discretion of the Chief Judge. Even assuming the continued existence of a specialized division, it must be kept in mind that after a few years the expertise -- gained from assignments in a specialized agency such as the FERC -- of the current judges placed in the various divisions will be lost through attrition. It is very doubtful that a new group of judges with the same expertise can be developed simply because there will be no place to get the necessary experience and training in a particular agency's jurisdiction, policies, etc.

I would like to point out another very important consideration, and that is, in general, the agency adjudication procedures play a very important function in policy making. It is by this route that agency policies frequently are fine-tuned. This is particularly true when the policies must be applied by the judge to factual situations that did not exist and were not anticipated when the policy was formulated. Further, in many instances, the agency policy is formulated through the adjudication process. Such procedures could not be effectively employed where the judge is not an expert in the policy and jurisdictional field of the agency. Certainly, the agency would not be prone to rely upon an individual that it did not observe on a day-to-day basis and who did not have a demonstrated knowledge of the industry regulated by the agency.

I want to say a few words concerning the independence of the administrative law judges at the FERC. The FERC administrative law judges enjoy total independence in the conduct of their hearings and in their initial decisions. Neither the Commission nor the Chief Judge discusses or reviews any judge's decision. The Commission and the Chief Judge see the initial decision for the first time when it is released to the public. Further, there is absolutely complete separation of the judges from the staff as well as the Commission. While the Commission staff presents a case in each proceeding, its case must sink or swim on its own merits. The judges at FERC, as well as their hearing rooms, library, and the like, are even isolated on a separate floor of the Commission's building. The ex parte rules in dealing with our judges apply to the Commission and the Commission staff as well as to the public.

The foregoing is not in any way intended to be all inclusive of the many problems we foresee would be created should a unified corps of administrative law judges be established by the Congress, but it is sufficient to demonstrate the need for much more study and consideration before such a giant step is taken to change the tried and proven current method of hearing and deciding administrative or regulatory disputes and problems which affect the lives of all the people of this great nation.

It is respectfully requested that a copy of this letter be included in the record of the hearing on S.950.

If I can be of further assistance to you in this or any other FERC matter, please let me know.

Sincerely,

Curtis L. Wagner, Jr.
Chief Administrative Law Judge

David S. Davidson
8814 Altimont Lane
Chevy Chase, MD 20815

July 31, 1987

Ms. Karen Kremer, Chief Counsel
Subcommittee on Courts and Administrative
Practice
United States Senate - Committee on the Judiciary
Washington, DC 20510

Dear Ms. Kremer:

My name is David S. Davidson, I am Deputy Chief Administrative Law Judge of the National Labor Relations Board. I have served as an Administrative Law Judge with the National Labor Relations Board since 1965. I write to you, however, as an individual, and not in my official capacity. I would like you to make this letter a part of the record of the recent hearing on S.950.

I was present in the hearing room on July 21, 1987, when the Subcommittee heard testimony and received statements on the Administrative Law Judge Corps Act, S.950. Several things were said about NLRB Administrative Law Judges to which I feel impelled to respond. As I heard Judge O'Byrne, he sought to portray the opposition to the Corps bill as coming almost exclusively from elitist NLRB judges. He also added that they shrank from hearing the kinds of cases he hears because of distaste for the typically poor claimants who come before him, but by letter of July 22, 1987, to Chairman Heflin he has indicated that he meant to suggest only that some of them might be afraid that they would have to hear an occasional disability case involving the very poor who so often appear before him.

Contrary to his assertion that NLRB Administrative Law Judges comprise 80% to 90% of the membership of Forum, the only Administrative Law Judge organization which appeared to oppose the Corps bill, I am reliably informed that NLRB judges comprise a little over 40% of its members. The others are drawn from 14 other Federal agencies. As NLRB judges comprise roughly one-third of the group of Federal administrative law judges eligible for Forum membership, the number of NLRB judge members in Forum is roughly proportional to the number of NLRB judges in the eligible administrative law judge population.

While proponents assert that administrative law judges overwhelmingly support the Corps bill, that support is heavily concentrated among the administrative law judges who hear benefit claims cases and who outnumber the remaining administrative law judges by 3 to 1. A poll taken several years ago showed that Federal Administrative Law Judges other than those hearing benefit claims cases were evenly divided over the issue of establishing a Corps.

The ad hominem remarks about the reasons NLRB judges oppose a Corps bill are entirely unwarranted by the facts. Judge O'Byrne cannot be aware of the kinds of cases we hear and the kinds of parties and witnesses who regularly come before us. The gratuitous slur on NLRB judges adds nothing to the merit of the debate over the Corps bill, and as an argumentative device it suggests, if anything, a fundamental weakness in the proponents' position.

One aspect of Judge O'Byrne's role which he described in his testimony does disturb me and many of my colleagues. As he testified, he is often called upon in effect to serve as attorney for the claimant (and the agency) as well as to decide the case. If we balk at the notion of serving as both judge and lawyer for the parties, he should balk at it too, for therein lie true conflicts and intrusions on independence.

At this hearing and in testimony on the similar bill before the Subcommittee during the 99th Congress proponents made a number of representations about the NLRB and other agencies with which they had no personal connection. They also represented that huge monetary savings would result from enactment of the Corps bill (Judge Barlow's statement, p. 13 estimates $30,000,000.00!). I would suggest that their sensational representations are not based on fact and that if the Subcommittee has any interest in these arguments, independent investigation of the proponents' claims is in order. I feel certain that the NLRB and other agencies would cooperate fully to supply any information the Subcommittee might request. Similarly, careful analysis by persons trained in budgeting and work planning should be the basis for any projections of savings that would result from a Corps rather than the superficial "logic" employed by the proponents. One thing we have all learned, sometimes with pain, is that bigger is not always better or more efficient.

Proponents like to compare the proposed Corps to central panel systems in the states. Again the comparison is superficial. I heard Judge Harves testify that his central panel has 29 judges. One should immediately be wary of comparing the benefits of creating a single office of 29 judges with the claimed benefits of creating a Corps of 1000. There are a number of questions to be asked in making such comparisons and evaluating the praise reported for state systems. What independence did the hearing examiners in these states have before the central panels were created? How were hearing examiners selected and what were the standards for their selection? Who controlled their pay? Did they have tenure? Was there anything like the federal Administrative Procedure Act in place to protect their independence? Do the central panels handle all state agency hearings or are there significant exclusions? Indeed, even with central panel systems some states still have practices which inhibit independence and which Federal administrative law judges properly have resisted, such as probationary periods, supervision of work, separate pay grades, periodic evaluations, merit pay, and limited tenure.

I for one worry about the prospect of a single Corps of 1000 judges with three-fourths of its work involving benefit claims. How will the resources of this Corps be distributed when they are not sufficient to give prompt attention to all demands? Will it give rise to tensions similar to those in State and Federal courts between the demand for speedy trial of criminal cases and the pressure for reduction of growing civil dockets?

Despite the proponents' repetition of the claim that the present system interferes with the independence of administrative law judges, only the examples from the Social Security Administration can be substantiated. I would agree that the problems they describe in that agency are serious and ought to be resolved. Yet I fail to understand how the Corps bill will resolve the basic problem. To be sure it may move some or all of it from the laps of the SSA judges and make them feel better, but it offers little benefit to the claimants, who after all are the real victims. The ultimate object of quotas is not to harass judges, but to control benefit awards so that they will track predetermined numerical targets for them. Administrators typically adopt such targets and try to meet them; judges do not. The basic conflict comes from combining administrative responsibility with the authority to review judges' decisions. Even if the Corps bill is enacted, that authority will remain where it presently is, and SSA will find other ways to achieve what it sees as its administrative goals.

There are indeed agencies in the Federal government which do not combine administrative and review functions. The NLRB is one. The prosecuting arm of the NLRB, the office of the General Counsel, is totally separate from the Board. The General Counsel is appointed by the President, confirmed by the Senate, and answerable to no one else in deciding whether to prosecute unfair labor practices. The Board's role with respect to unfair labor practices is limited to rule making and reviewing the decisions of its judges. It has no more voice in determining what cases comes before it than an appellate court. Similar relationships exist between OSHRC and OSHA, between FMSHRC and MSHA. I would suggest that the establishment of a separate review commission and transfer of SSA judges to the commission would not only answer the judges' problems but also those of the claimants and the District Courts. Certainly, the proposed solution -- creation of an agency housing all administrative law judges -- is an overbroad reaction to a discrete problem which can be resolved in a much more focused way.

I thank the Subcommittee for its consideration of these views.

Very truly yours,

David S. Davidson

David S. Davidson